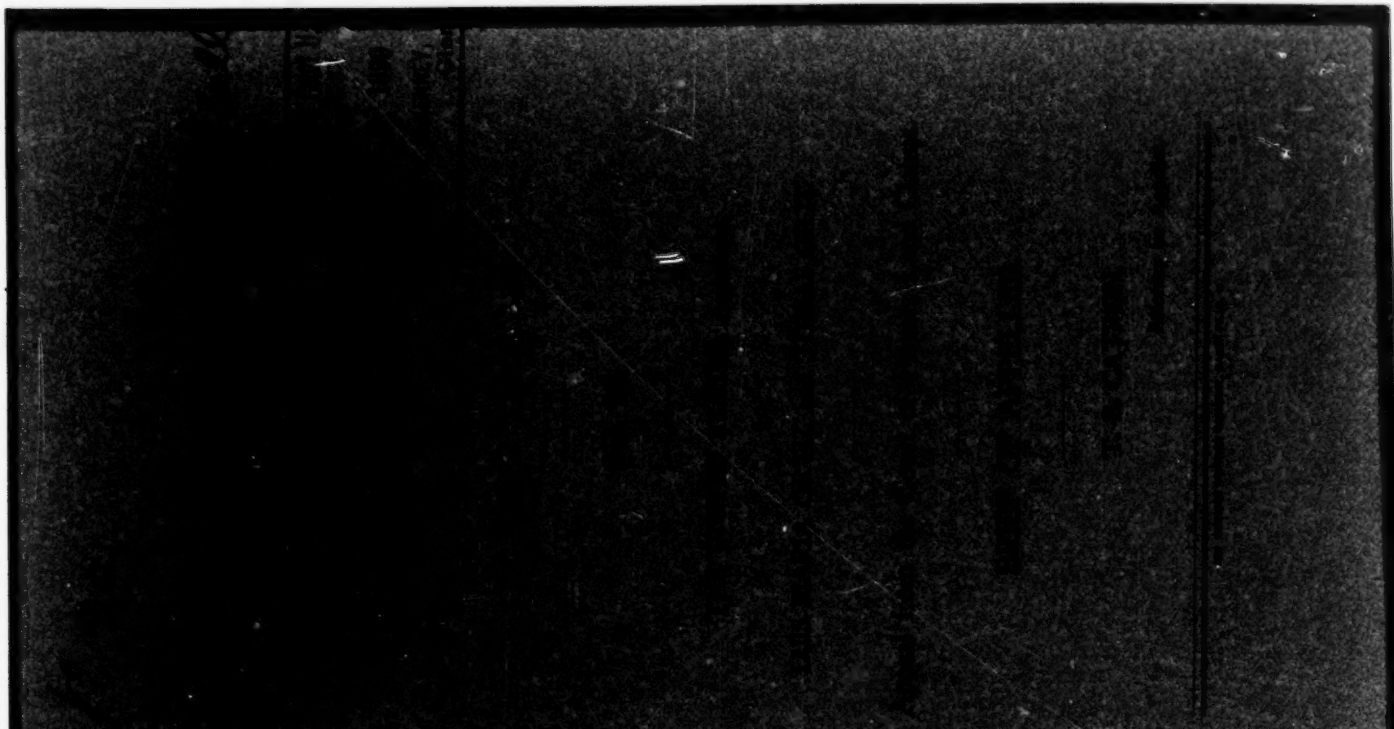

In The Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 20.

The United States, Appellant.

vs.

Luis Maria Ortiz and Tomas Ortiz.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF CASE.

This was a proceeding by appellees in the Court of Private Land Claims for the confirmation by that court of a grant of land called Sierra Mosca, and described in the petition for confirmation alleged in the petition to have been made on June 4, 1846, by Manuel Armijo, then Governor of the Territory of New Mexico, by virtue of his power and authority, and in accordance with the laws of the Mexican Republic.

The petition alleges that the grantee was placed in possession on June 8, 1846, by Jose Dolores Trujillo, justice of the peace, according to the laws and customs then in force.

That the original papers of the land are on file in the office of the Surveyor General as private land claim No. 75, and are not in the control of the plaintiff.

That in 1879 a preliminary survey of the claim was made by the United States, which covers an area of 33,250.39 acres.

That the said grant had been considered and acted upon

by the Surveyor General and recommended by him for confirmation by Congress, October 8, 1873.

That they, the petitioners, are the owners of the said grant of land by inheritance from their father, Gaspar Ortiz, who acquired title thereto by inheritance from his father, and by purchase from other heirs of the same.

That the land has been in the peaceable and undisturbed possession of the original grantee, his heirs and assigns and legal representatives, from the date of the making of the grant to the present time.

United States filed an answer and an amended answer. In their original answer, they allege they have no knowledge as to the facts set out. That for aught they know the matters and things alleged may be true, but they ask strict proof of them.

In their amended answer, which was filed just about the close of the trial of the cause, and over the objections of the claimants, they deny that on June 4, 1846, Manuel Armijo, then Governor of New Mexico, by virtue of the power and authority in him vested as such Governor, and in accordance with the laws of New Mexico, did grant and cede to Juan Luis Ortiz the full, complete and perfect title to the tract of land described in said petition, and further denied that the title papers presented by claimant, and purporting to contain the signature of said Manual Armijo, was signed and executed by said Manual Armijo, or by any one acting by his authority. And further denied that on June 8, 1846, the said Juan Luis Ortiz was placed in juridical possession of said grant by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in said republic, and allege that said Jose Dolores Trujillo was not at the time a justice of the peace of the jurisdiction alleged in the title papers, or otherwise authorized by law to invest said grantee with juridical possession.

And further denies that said land has been in the peaceable and undisturbed possession of said grantee, his heirs and legal representatives, from the date of making said grant to the present time.

To sustain the issue, claimant introduced in evidence the

original grant, or one of the original copies, there having been two copies or duplicates, from the archives of the Surveyor General's office, marked "Exhibit A," found in the record, pages 71, 72, 73 and 74. Also, petition to the Surveyor General for confirmation thereof (record, page 75). Also, decision of the Surveyor General (record, page 76). Also copy of the plat of preliminary survey made by the government of the United States, showing its contents to be 33,250.39 acres, which also contains the field notes and certificate of the Surveyor General (between pages 78 and 79 of the record). Also letter of U. J. Baxter, acting commissioner to H. M. Atkinson, dated September 12, 1876. Also communication of C. Delano, Secretary of the Interior, to Hon. Henry Wilson, Vice President. Also the testimony taken before the Surveyor General on the hearing of the cause before him on behalf of the claimant, to-wit, the evidence of Antonio Sena (record, pages 67 and 78), of Pablo Dominguez (record, pages 68 and 69), of Joab Houghton (record, pages 69 and 70), and of Ramon Sena y Rivera (record, pages 70 and 71); also, testimony of T. B. Catron (record, pages 63 and 64). Also of Antonio A. Herrera (record, pages 61 and 62). Also evidence of E. F. Sidebottom (record, pages 6, 7 and 8); also of Epifano Vigil (record, pages 8, 9 and 10); also of Juan Cristoval Romero (record, pages 10, 11, 12 and 13); also of Magdalena de Ortiz (record, pages 13, 14, 15 and 16). Also, plaintiff's "Exhibit G," being extract from the testimony of Jesus Maria Ortiz y Baca (record, page 140). Also Exhibits K2, L2, M2 and N2 (record, pages 140, 141, 142 and 143).

The grant was made on the petition of Juan Luis Ortiz, who describes himself as a resident of Pojoaque, and applies to the Governor, saying: "That desiring through the most legitimate and proper means to encourage agriculture, so much recommended by the laws, and finding myself at this time with lands so considerably restricted as to not furnish a fair substance for the support of the large family I provide for, and having seen and examined with great care a tract of public land which is situated near the place of my residence, which I describe to your excellency under

the following boundaries (Here the boundaries were set out in full); and finding in the same tract, which I solicit from your excellency, the advantage of containing fertile land for cultivation, pastures and water sufficient, and all else which is needed, necessary for raising stock; and satisfied as I am that it is public and unappropriated land, as I have already stated, I have not hesitated to apply to the justice of your excellency, asking very respectfully that for the sake of and in justice you be pleased to grant me the said possession, which I ask in the name of the Mexican nation, to which we have the honor to belong, protesting that I do not act in assimilation and whatever be necessary, etc., stating to your excellency at the same time that my petition is not upon paper of the proper stamp, there being none in this city, but I promise to attach one cancelled, as soon as there shall be any." (Record, pages 71, 72 and 73.)

The application was dated June 3, 1846. On June 4, 1846, the Governor, Armijo, made his decree acceding to the solicitation for the grant, which in Spanish is as follows:

"Santa Fe, Junio 4, de 1846.

"Siendo ejecutive lo que expone el presentante an la antecedente instancia, solicitando se le mercene el terreno valdio que dissena en la misma, y conbensido este Gobierno de las justas razones que espone para el peticionario al juez a quien corresponde para que lo ponga en posesion del terreno solicitado con total arreglo a las leyes de la materia.

"ARMIJO.

JUAN B. VIGIL Y ALARID, Scrio."

Which, as translated in the record, reads as follows:

"Santa Fe, N. M., June 4, 1846.

"What is stated by the petitioner, in the foregoing petition, asking that there be granted to him the public land which he described in the same, being true, and this government being convinced of the good reasons he sets forth, the petitioner will apply to the proper justice, that he may place him in possession of the land solicited in entire conformity to the laws in the premises.

"ARMIJO.

"JUAN B. VIGIL Y ALARID, Sec."

The foregoing translation, as contained in the record, is very badly done. A more correct translation would be about as follows: What the petitioner represents, in the foregoing document (instancia), soliciting that he be granted the public land, which he describes therein, being a matter to be carried into effect without further delay (siendo ejecutive), this government being convinced of the justice (or correctness) of the representation (justas razones) made by the petitioner (he is directed) to the justice (juéz), to whom it corresponds that he may place him in possession of the land solicited, in entire conformity to the laws on that subject.

The act of juridical possession is as follows:

At this place of our Lady of Guadalupe, on the 8th day of the month of June, one thousand eight hundred and forty-six, before me citizen Jose Dolores Trujillo, justice of the peace *at said place*, appeared citizen Juan Luis Ortiz, resident of the same, who presented me the foregoing superior decree of Don Manuel Armijo, most excellent Governor and commanding general of the department of New Mexico, placed upon the margin of the present petition, dated on the 4th instant, in which I am notified to place the said Juan Luis Ortiz in possession of the land he requests be granted him in conformity with the laws of possession. Wherefore, I, said justice of the peace, accompanied by my attending witnesses, proceeded to put into execution the said superior decree which I fulfilled, designating the boundaries set forth: On the east a high mountain called the Mosca, or Pachuelo slope; on the west a fourth of a league below the waterfall on Little Springs Meadow; on the north a small flat mountain, some arroyos running between west and north; and on the south a rocky hill which stands above the Chupadero Valley, or boundary of the residents of Tesuque River; and having complied with what I am directed to do by the most excellent Governor and commanding general aforesaid, I gave him to understand that said favor and donation has been conferred upon him in the name of the Mexican nation, to which we have the honor of belonging. And in due testimony, as well in the present as in the future, I executed to him the pres-

ent document of possession, signed by myself and my attending witnesses, with whom I act specially for lack of a notary public, there being none in this department. To all of which I certify.

JOSE DOLORES TRUJILLO.

Attending: YGNACIO ALARID.

Attending: MIGUEL GONZALES.

The proofs by living witnesses in this case have become somewhat limited. It is to be noticed that nearly all of the witnesses for the appellees are witnesses whose testimony was taken in the year 1872, twenty-four years before the time of trial in the land court. Each one of said witnesses was dead, as well as several of the witnesses for the defense. Claimant insists that after the government of the United States took possession of New Mexico in 1846, it was inequitable for it to wait forty-five years, until all witnesses who may have been old enough to know and to give particular attention to the subject of the grant had died, and then insist upon the most rigid constructions and the strictest proofs which could be had, even though the act of 1891 had been adopted, like the one in California in 1851, when all the witnesses of grants lately made would be alive, and all the office holders would all most certainly be alive, but Armijo is dead, and Juan Bautista de Alarid is dead, Jose Dolores Trujillo is dead, Juan Luis Ortiz and Gaspar Ortiz y Alarid are dead, and all of the witnesses whose testimony was taken before the Surveyor General are dead. It is hardly to be considered fair that a great government which had the sole power to bring these cases to a hearing at a very early day should wait so long, and after witnesses had all died who would be particularly cognizant of facts, to insist at this late day that proofs which were deemed sufficient forty years ago should now be deemed insufficient, or to insist that testimony taken before the Surveyor General a quarter of a century ago in a perfunctory manner, before an individual who was not learned in the law, and for the purpose solely of advising Congress and not for the purpose of getting judgment, should be held to be insufficient. It is a rule of law that the best evidence which can be obtained under the circumstances will always be ac-

cepted to establish facts. For this reason ancient documents prove themselves, because the witnesses who can establish them are supposed to be dead. Hearsay evidence of old people who are dead establishes heirship and genealogy. In fact, almost all facts which are beyond the memory of living men are allowed to be established by hearsay testimony, but it seems that the government in this case, through its attorney, seeks to rule the claimants down to even a more rigid rule than existed in California in 1851. Notwithstanding these facts, claimants insist that the proofs taken before the Surveyor General establish all essential facts necessary to be proven. On page 67, Antonio Sena, a witness for the claimants, testified that he was sixty-one years of age (He was testifying November 19, 1872.); that he was residing at Santa Fe in the month of June, 1846, and at that time was prefect of the first district of New Mexico (An office which required a man of intelligence and responsibility to fill.); that he knew Juan Luis Ortiz, who resided at Pojoaque in June, 1846; that Juan Luis Ortiz died in 1855 or 1856, to the best of his knowledge; that in June, 1846, General Manuel Armijo was Governor of New Mexico, and Juan Bautista Vigil y Alarid was the Secretary of State at the same time; that he knew the signatures of Armijo and Vigil y Alarid, having seen them write innumerable times; that their signatures to the grant in question, which was shown him, are genuine; that Jose Dolores Trujillo at that time was justice of the peace at Pojoaque; that he was acquainted with the signature of Jose Dolores Trujillo, and he examined the document or grant papers in this case, and stated the same was his genuine signature. He further stated that as prefect he had authority to appoint the justices of the peace in his district, and he appointed him for the precinct or demarcation of Pojoaque. That he knew the property of the Sierra Mosca under investigation, but that he could not state the boundaries. That it lies in Santa Fe county, about six or seven leagues north of the City of Santa Fe. That he knows that there was a grant made for this property in June, 1846, by Governor Armijo to Juan Luis Ortiz, and the decree which was there in the original was signed by Governor

Armijo in his presence on the 4th day of June, 1846, referring to the paper in the case marked "Sierra Mosca Grant —Original." That in the month of June, 1846, there was no stamped government paper at Santa Fe, and they had to use common paper. That he knew that Juan Luis Ortiz and his heirs had always occupied that land ever since the grant, and that it had always been reputed to be theirs. That he had no interest in the claim. That he was not present when the American troops took possession of Santa Fe, being a captain in the Mexican evacuating army, but he knew that it was subsequent to August 16, 1846.

This witness shows that he was a man who was trusted by the public authorities with high positions, a prefect being a man or officer second in authority only to the Governor. He was also holding the position of a captain in the Mexican army, and evacuated Santa Fe with the Mexican troops, which took place about the 16th of August. History tells us the American troops took possession of Santa Fe on the 18th of August. This witness testifies positively that he was present, and that Armijo signed the decree of the grant paper in his presence, so that he saw the matter and was a living witness to that fact. He also says that the property in question was occupied by the grantee and his heirs always, and that it has always been reputed to be theirs.

Pablo Dominguez, another witness for the claimant, testified on the same day that he was sixty years old. That he resided at Santa Fe in 1846, and was a lieutenant in the Mexican army. That Manuel Armijo, in June, 1846, was Governor of New Mexico, and Juan Bautista Vigil y Alarid was Secretary of State of New Mexico, and Jose Dolores Trujillo was the justice of the peace at Pojoaque at that time. That he is acquainted with the signatures of those officials. He was shown their signatures on the documents in this case, marked "Sierra Mosca Grant—Original," and stated that he had examined and found each of them to be genuine. That he knew their signatures well. That he knew the property claimed in the case. That it lay in the county, about eighteen fo twenty-one miles north of the City of Santa Fe. That the tract of land had been occupied

by Juan Luis Ortiz and his heirs all the time since 1846, and had always been reputed to belong to them. That he knew Jose Dolores Trujillo to have been dead at that time, about six years, and that he (witness) had no interest in the claim.

Joab Houghton, another witness for the claimants, testified July 1, 1873, that he was then fifty-five years of age and resided at Santa Fe, and had resided there since November 1, 1843. That he had been United States Vice Consul, Chief Justice and Associate Justice of the Supreme Court of New Mexico, and Register of the United States Land Office. That he knew Manuel Armijo, Governor of New Mexico, and Juan Bautista Vigil y Alarid from the winter of 1843 and 1844. His relations with them were official and private, *and I rather intimate*. He knew them both until they died. That he had often seen them write, and was familiar with their signatures for the last twenty-five years, and thinks he would know them if he saw them. The granting documents in this case were then shown to him. He was asked to examine them and state if the signatures of said Armijo and Vigil y Alarid were genuine or not, and he stated that he recognized Armijo's signature as being genuine on the document, and that also that of Juan B. Vigil, though signed somewhat differently from his usual way. That he knew that steel pens were used very extensively in the Territory of New Mexico in 1846, and previously to that were used occasionally. That he imported them in 1844. That he did not know whether Mexican officials used them in 1846. That he does not think Governor Armijo was in the habit of becoming intoxicated. He had seen him drink often, but never saw him intoxicated. That he had frequently seen him in a condition of excitement and nervousness, such as would be likely to affect his handwriting if using a kind of pen he was unfamiliar with, particularly at the time of the battles in Mexico of 1846 and the approach to Santa Fe of the American troops in the summer of 1846. That he had no interest in the matter under investigation.

This witness was United States Vice Consul at Santa Fe in 1843. He was Chief Justice of the Supreme Court, ap-

pointed by General Kearny under the provisional government in 1846. He was Associate Justice in the Supreme Court of New Mexico in the latter part of the administration of President Lincoln, and during most of the administration of President Johnson. He was Register of the Land Office at Santa Fe under President Lincoln. He had ample opportunity to know the facts about which he testified. He was a man above reproach, and he could have no interest in the result.

Ramon Sena y Rivera, another witness for the claimants, testified July 1, 1873, before the Surveyor General that he was then fifty-six years of age. That he resided at the town of Pojoaque, in the County of Santa Fe. That in 1846 he was stationed and resided at Santa Fe as adjutant of the post, and belonged as lieutenant to the military company then at Santa Fe, known as the permanent cavalry company of El Bado. That he knew Governor Manuel Armijo, and Juan Bautista Vigil y Alarid from his youth. That he had seen them write, and was acquainted with their handwriting. That he knew Juan Luis Ortiz, the grantee in this case, from his youth. That he was then dead. He was then asked to examine the document marked "A" in the matter of that investigation, which is the granting paper in this case, and to state if he knew anything about the same, and whether the signatures of Armijo and Vigil y Alarid were genuine, and whether Juan Luis Ortiz was placed in possession, to which he answered that he had examined the signatures of Armijo and of Vigil y Alarid upon the document, and that he was satisfied that they were both genuine. That in the year 1846, he thinks in the month of June, he was requested by Juan Luis Ortiz to go with him to present to Governor Armijo a petition for land, being the petition shown him on document "A," which bears the genuine signature of Ortiz. That Governor Armijo directed a clerk (he did not know who) to write the decree, the same on the margin of the document shown, which decree he then and there signed, as did also Mr. Vigil y Alarid. That the Governor then handed the document to Ortiz, who requested witness to proceed with him to the alcalde at Pojoaque, to be by him placed in possession of

the land, and that the alcalde did place Ortiz in possession, executing the act in his presence, the record of that act being borne on the document "A" is the act of possession it refers to. That the signature of Jose Dolores Trujillo, which it bears, is his genuine signature. That Ortiz lived upon the land during his lifetime, and his heirs continued to occupy it since his death, and it has been continuously occupied by them, and they have always been the reputed owners of the land and respected as such. That he had no interest in the land, having disposed of all he had to Gaspar Ortiz y Alarid. That the petition of Ortiz the Governor was *presented* to him *in dupicate*, and when he had acted upon *them* he handed one of the documents to Ortiz and the other he handed to Mr. Vigil y Alarid, to be placed among the archives.

This witness, it will be seen, was also a lieutenant in the Mexican army, as a lieutenant in the permanent cavalry. It is true that he was a brother-in-law of Juan Luis Alarid, and occupied a position of trust toward the Governor, so that his story is probable as being the person who the grantee would most likely take with him to the Governor, and one who would most likely go with him to Pojoaque when the possession was delivered; that was his residence at the time. He also shows that he was present when the decree making the grant was signed by Armijo and by Vigil y Alarid. That it was presented and signed in duplicate, and one copy given to Ortiz, the grantee, and another to Vigil y Alarid to be placed in the archives.

On the trial of cause, E. F. Sidebottom, who was called as a witness for claimants, testified that he was custodian of the archives in the office of the Surveyor General. He produced the papers in the private land claim No. 75, known as the "Sierra Mosca grant" made to Juan Luis Ortiz, from the archives, and stated that they were all that had been filed and that are shown in the docket. In substance, that they were all the papers in that grant that were on file in the Surveyor General's office at that time.

It does not appear positively whether the grant papers presented in this case were the ones which were filed in the archives by Vigil y Alarid, or at least delivered to him by

the Governor to be placed in the archives, or whether they are ones which were delivered to the grantee upon which to obtain possession. *If* they are not the one which was placed in the archives by order of the Governor by Vigil y Alarid, the secretary, then the testimony of this witness shows that that duplicate copy of the grant is missing from the archives.

This court says in the case of the United States against Chaves, 159 U. S., p. 462, et seq.:

"After repeating the evidence which was introduced in regard to the loss of a portion of the archives of the Territory of New Mexico which had been sold, destroyed or lost by the action of the librarian, say: 'In view of a large body of uncontradicted evidence, we think that the court below was plainly right in finding that the claimant had satisfactorily sustained the allegations in their petition. Not only was there evidence of the existence of an original grant by the government of New Mexico, and the loss of the original records, sufficient to justify the introduction of secondary evidence, but—'"

This is an adjudication of the fact by this court, as also by the Court of Private Land Claims in the trial of that case below, that the archives of New Mexico had been lost or dissipated to such a degree that when a document was not found in the archives, which had been proven to have been once placed there, or at least in the hands of the keeper for that purpose, to be placed there, it was sufficient to establish a reasonable probability of its loss, so as to be allowed to introduce secondary evidence of it.

The evidence in this case conclusively shows that Juan Luis Ortiz was placed in possession of the property. Ramon Sena y Rivera says that he was present and saw that done. It shows that he was residing at Pojoaque, which is the place in the near vicinity of which this property was situate, at the time the grant was made, and that he resided upon it thereafter, and at all times occupied it until his death, and after his death his heirs occupied it up to the present time. This is shown by three uncontradicted witnesses. The attorney of the United States, however, asked this court to assume that this is not true, because the

daughter-in-law of Juan Luis Ortiz, the widow of Gaspar Ortiz y Alarid, testified on the trial of this cause, on the 19th day of August, 1896, that she was then living at Santa Fe. That Juan Luis Ortiz died in Santa Fe, she thought in '61 or '62, and that at the time of his death he was residing in her house, and that he always resided there before and after his death. That she thought he had been residing there thirty or forty years. She did not testify, however, that her house was always at Santa Fe, at any other particular time, except at the time she was testifying on the 19th of August, 1896. On the contrary, one of the witnesses for the defense, who was exceedingly hostile, and had an interest in another alleged grant, which was afterward admitted to be forgery, testified that in 1846 Juan Luis Ortiz, also Gaspar Ortiz y Alarid, lived in Pojoaque. The witness Jose Ortiz, called for the defense, on page 19, says that he knew Juan Luis Ortiz. That he lived at Pojoaque in 1846, and that Juan Luis Ortiz lived there near him. This witness says, also, that at the time of the death of Juan Luis Ortiz that he was living with Gaspar Ortiz, his son, at Santa Fe. That he had been living some years with Gaspar Ortiz, but he cannot state the number of years, nor does he state where. Although he does say that Juan Luis Ortiz lived near him in Pojoaque. No witness disputes the facts proven by three or four witnesses for the claimants, that Juan Luis Ortiz did live at Pojoaque in 1846, and by one of them on the land itself in question, and by all of them, that he occupied the land there—he and his heirs—up to the present time.

The appellants undertake to prove by one witness, Mr. Tipton, who claims to be an expert, by a comparison of various signatures which Tipton claims to be the genuine signatures of Manuel Armijo, that the signature of Armijo to the grant in question, is not genuine. Claimants insist that eye witnesses of the signature when it was made, constitute the best evidence, and the testimony by comparison with other signatures, is the weakest of evidence as to the genuineness of signatures. Authorities on this point will be cited under the proper head. But defendants undertake to claim that the grant is spurious because, as they allege,

Jose Dolores Trujillo, who, as justice of the peace at Pojoaque, gave possession, was not such justice of the peace at the time such possession was given. This fact they seek to establish by producing certain archives from the justice of the peace at Pojoaque, which they claim formerly pertained to the demarcation of San Yldefonso, within which Pojoaque was formerly situated, and in which they claim there is a paper representing an arbitration, in which Jose Dolores Trujillo acted as arbitrator in a matter, and his name appears affixed thereto. They now ask this court to take that paper and compare the name affixed to it, of Jose Dolores Trujillo, and the writing of that name, with the signature of Jose Dolores Trujillo to the act of juridical possession. They do not introduce any testimony whatever to prove that Jose Dolores Trujillo signed that paper, or that that is his genuine signature, nor did they rely upon it in any manner for that purpose, in the trial of the case below. That paper and all others in those archives were objected to by the claimant when introduced. (Page 50, Fo. 74.) And certainly at this late date, after the case has passed out of the Court of Private Land Claims, defendant will not be allowed to use it without proving it to be the genuine signature of Jose Dolores Trujillo, who claimants insist acted as justice of the peace for the purpose of a comparison with the signature to his act of juridical possession, in order to discredit that act. Besides the comparison of signatures is the lowest order of proof, and before you can use a signature to compare with the one in question it must be *admitted* to be a genuine signature. In this case, it is neither *admitted*, nor is it attempted to be proven. On the contrary, the signature of Jose Dolores Trujillo, to the act of juridical possession, is proven to be his genuine signature by Antonio Sena, the prefect who appointed him as justice of the peace at Pojoaque (page 68), and also by Ramon Sena y Rivera, who says (page 71) that Jose Dolores Trujillo placed Ortiz in possession of the land, executing the act in his presence, and that the signature of Jose Dolores Trujillo, which that document bears, is his genuine signature, and that that document is the record of the act of juridical possession.

Here is a witness who was present and witnessed the possession given; says the document is the record of the act, and that the signature is genuine. Evidently he means to testify that he saw that document executed or made out, as was as the possession given. The testimony of two witnesses such as these, certainly ought to be controlling over any other testimony in this case, as to that signature, or as to any other signature.

It seems that defendants in this case not only wish to take advantage of the fact that the government by its own laches waited nearly a half century before organizing the land court, until nearly every witness who could know the facts is dead; in fact, until nearly every witness who testified for the claimant before the Surveyor General is dead, but they undertake to criticise the testimony on account of it not being as full and complete and as exact as it might be, but they also ask to have this court consider as evidence matters to which no proper foundation has been laid, to compare signatures and decide for the government against positive testimony given; they have the audacity even to attach to the end of their brief a bare certificate made by the witness Tipton, and ask this court to consider that certificate, which has not even the dignity of an ex parte affidavit, the very matter about which this witness certifies, having been judicially determined by this court to the very contrary of his certificate, on his testimony taken in the Court of Private Land Claims. (United States vs. Chaves, 159 U. S., 463.)

It is submitted that the government, after having waited so long to give claimants the opportunity of establishing their title, and until all the living witnesses who knew anything about the case, are dead, should at least be held down now to the strictest construction of the evidence against them. As before stated, it is a rule of law that every case is susceptible of some kind of evidence, to prove facts which existed, and the best evidence which can be had must control, and the rule as to what is the best evidence is relaxed as time goes by and witnesses die and documents have been lost. We insist that the government has not only waited nearly fifty years, until the living witnesses, knowing

the facts, have disappeared, but it has so negligently kept the archives of the Territory of New Mexico that portions of them have become lost and despoiled which contained grants of lands. This fact has also been adjudicated by this court on page 463, 159 U. S., United States vs. Chaves, where this court determined that the facts proven in that case sufficiently established the loss of a portion of the archives containing grants to land to justify the admission of secondary evidence.

The testimony of this case, of Ramon Sena y Rivera, shows at least that a copy of the petition and of the grant in this case was handed to the Secretary of State, Juan Bautista Vigil y Alarid, who had charge of the archives, to be placed by him among the archives, which we say, or insist, sufficiently proves that the grant in this case was a part of the archives. Sidebottom proves that all of the papers in this grant case were produced before the court, and all of them were introduced into evidence. Claimant maintains that there is no evidence in this case to show that the paper produced as being the grant was not the original one which was given by Armijo to the secretary, to be placed in the archives. The justice of the peace, residing about eighteen miles only from Santa Fe, doubtless went to Santa Fe and indorsed his act of juridical possession upon the retained copy, that is, the one which was placed in the archives. And the one introduced may be that copy. There is nothing to show that it is not. But if it is not, then that has disappeared, according to the evidence of Sidebottom, and the loss of papers from the archives contained grants to land, having been judicially determined, the door is opened for secondary evidence.

The testimony in this case shows that Juan Luis Ortiz, at the time the grant was made, was residing at the precinct of Pojoaque, near to the pueblo of Nambe, which is some miles east of Pojoaque, and very near to the land in question.

This is shown by defendant's witness, Pablo Ortiz, who testifies that he had always lived in Pojoaque, that is, above the town of Pojoaque, near the pueblo of Nambe, and that Juan Luis Ortiz, in the summer of 1846, lived near him.

only a wall separating them. It also appears from the evidence of one of the witnesses for the defense and of Magdalena de Ortiz that Juan Luis Ortiz died at Santa Fe in 1861 or 1862. The witness says she thinks it was in October, 1861, more or less, but that it was in the latter part of 1861 or in the early part of 1862. (Pages 13 and 14.) It also appears that Gaspar Ortiz y Alarid was married in 1848, two years after this grant was made to his father, and that at that time he was living at Pojoaque. Also, it appears by a witness of the defendant that Juan Luis Ortiz had been clerking for his son, Gaspar Ortiz y Alarid, at Santa Fe, possibly about ten years prior to his death. He was unwilling to state the length of time, and said it might be more or less. Nor does any witness state that Gaspar Ortiz y Alarid was residing any particular length of time in Santa Fe, or even that he resided there at all during the time while his father was clerking for him, except inferentially. But certainly no witness pretends to say or even hints that Juan Luis Ortiz, for the period of at least five years subsequent to the issue of this grant did not reside near Pojoaque, or upon this grant. Antonio Sena, Pablo Dominguez and Ramon Sena y Rivera all testify that he and his heirs occupied it from the making of the grant down to the present time. Ramon Sena y Rivera says he saw him placed in possession, and that he went *on to it and fired on it*. The grant was made about two months and a half before the American troops occupied Santa Fe, and before they left Fort Leavenworth to start on the expedition to Santa Fe. Armijo knew, of course, that war existed between Mexico and the United States, but it cannot be presumed he knew that New Mexico was to be occupied by the American troops before any American troops had started toward the territory. That would be giving him very great forethought. It was well known that about that time that the government of the United States was directing all its energies toward fitting out the expedition under General Scott to march directly upon the capital of Mexico. Naturally an officer occupying the position of military commandant as well as Governor would be on the lookout for any contingency, but Santa Fe is about eight hundred and

forty miles from Fort Leavenworth, the place from which General Kearny's troops started. They did not start until after the fourth of June, 1846. The country between Fort Leavenworth and Las Vegas, which is seventy miles east of Santa Fe, was an absolute wilderness, occupied only by the savage Indians and wild game, including the buffalo. There were no mails between the two countries, and no one at that time dared traverse the distance alone. These are historical facts of which the court may take judicial notice.

Appellants have furnished appellee's counsel with a manuscript brief containing over a hundred and sixty pages, in which every imaginable authority which appellant's counsel might think in any way bore upon his contention has been cited, and every technicality has been urged against the grant, even to insisting upon a more rigid rule than was applicable in California, not taking into consideration the difference between the two acts. It is insisted, in effect, that this court ignore the treaties referred to in the act, and also the act itself which organizes the Court of Private Land Claims, but that act, to say the least, confers jurisdiction upon the land court to the extent mentioned in the act.

Section 7 provides that the validity of the title and the boundaries of the claim shall be determined by final decree, according to the laws of nations, the stipulations of the treaty * * * and the laws and ordinances of the government, from which it is alleged the grant was derived. It was expressly made for imperfect and inchoate grants.

Section 6 refers to the character of grants which *must* be presented to that court, that is, a Spanish or Mexican *grant, concession, warrant or survey*, which the United States are bound to recognize and confirm by virtue of the treaties of cession of the country to the United States, and which at the date of the passage of the act had not been confirmed by Congress or finally decided upon by lawful authority, and which were not then already complete and perfect.

Section 8 of the act provides that any person having a grant which was complete and perfect should have the

right, but should not be bound to apply the court for a confirmation. So that the act was obligatory upon persons claiming incomplete or imperfect grants and *only* obligatory upon them.

Section 13 provides that no claim shall be allowed which shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or of a state having lawful authority to make it, and one which, if not complete and perfect at the date of the acquisition, the claimant would have had a lawful right to make perfect had the territory not been acquired, and that the United States are bound upon the principles of public law, or by the provisions of the treaty of cession to respect and permit to become complete and perfect. Again recognizing that the act was particularly applicable to incomplete or imperfect grants. The grant papers in this case marked "A" and the translations thereof, copies of which are found on pages 71, 72, 73 and 74, were introduced in evidence, record page 10, and the only objection to them was by Mr. Pope, who says: "We desire to enter a formal objection to this grant; its custody has not been accounted for, and its genuineness is not proven."

POINTS AND AUTHORITIES.

The first proposition submitted by the appellant in his long brief is that under the colonization laws of Mexico, in force at the date of the grant, the Governor of New Mexico had no power or authority to make the grant, or initiate proceedings for that purpose, and that the grant was void for that reason.

It is contended by appellant that the Territory of New Mexico as a Mexican territory ceased to exist in 1837, and that New Mexico was made a department; that political chiefs were abolished, and governors created; that territorial deputations were done away with, and departmental juntas took their place.

It is true that in form this was done, but it was a change in name and not in substance. The territory remained under the name of the department with its same limits. A

governor took the place of a political chief, with the duties imposed upon him to execute and carry out the laws. The departmental junta had practically the same duties and powers conferred upon it as existed in the territorial deputation, possibly more.

This question, however, has been adjudicated time and time again. There is nothing in the act creating the Court of Private Land Claims which in any manner affects the Territory of New Mexico in regard to this point differently from what it did in California. There was no special legislation in Mexico for either one of the territories. The Supreme Court of the United States has repeatedly construed the Mexican act of August 18, 1824, and the regulations of November 21, 1828, in considering the validity of grants made subsequent to 1837, the time of the alleged change, and have uniformly construed that those acts were in force and regulated the mode and manner and power to make grants of the public lands in the Republic of Mexico. And in a case taken from this territory (United States vs. Vigil, 13 Wall., 450), which was in reference to a grant made in the year 1845, while said grant was rejected by the Supreme Court, still it was held that the law of August 18, 1824, and the regulations of November 21, 1828, were in force, and were the only laws in force regulating the making of grants. This decision was with regard to the law which was in force in New Mexico in 1845, and the courts say: "It has been repeatedly decided by this court that the only laws in force in the Territory of New Mexico for the disposition of public lands, with the exception of those relating to missions and towns, are the acts of the Mexican Congress of 1824 and the regulations of 1828."

United States vs. Osio, 23 How., 275, et seq.
United States vs. Cambuston, 20 How., 60, et seq.
This case being founded on a grant made in 1846.
United States vs. Reading, 18 How., 3, 7.
Hornsby vs. The United States, 10 Wall., 236.

In the case of Hornsby vs. The United States, et supra, the courts say, "That the Governor under Mexico was authorized to make grants of land in the department of Cali-

fornia is not questioned, and that the instrument produced in this case is genuine and was issued by him, is admitted, etc."

The case of The United States vs. Reading, et supra, contains quite a lengthy discussion on page 7 in regard to that law and regulation, to which the attention of the court is respectively invited.

See also United States vs. Vallejo, 1 Black, 541.
United States vs. Workman, 1 Wall., 761.

In this last case the court says: "Ample authority was conferred upon the Governor of California to grant vacant lands belonging to the supreme government." Such authority was derived from the colonization law of the 18th of August, 1824, and the regulations of the 21st of November, 1828, as has been affirmed by repeated decisions of this court. The grant in this case was made in 1846. It was held not valid, because it was a disposal of mission lands and not vacant public lands, and this case expressly calls attention to a statement in the act of June 12, 1843, and the new constitution then adopted (page 451), showing that the matter was entirely before the court.

In United States vs. Vallejo, 1 Black, 552, there were two grants under consideration, one as a colonization grant, dated March 15, 1842, the other the 19th of June, 1844. This court, speaking of that regulation on page 552, says: "The above are the only laws of the Mexican Congress passed on the subject of granting the public lands, with the exception of those relating to the missions and towns, which have no bearing on the question. None others have been produced in the argument, nor have our researches found any, nor were any others discovered by the public agents which were authorized by this government to inquire particularly into the subject."

United States vs. Sutter, 21 How., 177. This grant was made about the year 1845.

The attorney of the United States contends that by virtue of the law of April 4, 1837, which provided that "the government, in concurrence with the council, shall proceed

to make effective the colonization of the lands that are or should be the property of the republic by sales, leases or mortgages," etc., repealed the colonization law of August 18, 1824, and November 21, 1828. There is a provision at the end of that law which says: "Not being embarrassed by the laws heretofore enacted on colonization, whose provisions are repealed in so far as they conflict with the present, re-enacting, however, the prohibition of article 11 of the law of April 6, 1830." Article 2 of the law of April 6, 1830, provides: "In the exercise of the power which the general congress reserves to itself, in article 7 of the law of the 18th of August, 1824, it is forbidden to colonize foreigners of adjacent countries in those states and territories of the federation which adjoins their nations."

Section 7 of the law of August 18, 1824, provides: "Prior to the year 1840 the general congress shall not prohibit the entry of foreigners to colonize unless imperious circumstances force it to it with respect to the individuals of some particular nation."

It will thus be seen that the law of April 4, 1837, simply provides an additional mode of colonization. That is to say, it provides that the general government may act concurrently in the matter of colonization, for the purposes and subject to the limitations provided in that act. That is, the government, independent of what the governors of the territories might do, may sell, lease and mortgage the lands, applying the income therefrom to the funding of the national debt contracted or to be contracted. There is nothing in conflict with the colonization laws of 1824 in this act. Whichever one of those authorities should act first upon a given piece of property would supercede the other as to that property. If it had been the intention of the Mexican Congress to repeal the colonization laws of 1824 and the regulations of 1828 absolutely, as contended by the government, why did it not say so? Certainly, by saying that they were only repealed in so far as they conflicted with that act is an implication that they were not repealed in toto, but that something remained under those acts. If anything remained, what was it? If it takes away from the Governor the power to make grants, then those acts are

as completely dead as an individual who may be decapitated. None of the powers following the right to make the grant by the granting authority could exist without the exercise of that authority. If the power was left in the Governor to make the grant, which must have been so, or the whole act was repealed, and the words in the act of 1837 would be useless, and every other provision would remain to carry out the terms of those grants which could be made. Evidently what was meant by repealing the colonization laws so far as they conflicted with the act of 1837 was to estop the governors from acting upon those lands where the federal government might have initiated proceedings to sell, mortgage or lease. This construction is further carried out by the provision at the end of the section continuing in force the prohibition contained in article 11 of the law of April 6, 1830, which referred to article 7 of the law of 1824. If by the provision of the law of April 4, 1837, the whole colonization laws were repealed, then why did that section say that "in the exercise of the power which the general congress reserved to itself in article 7 of the law of the 18th of August, 1824, it is forbidden to colonize foreigners of adjacent countries, etc.?" If the whole law was repealed, section 7 would have gone down with it, and that prohibition was unnecessary. On the contrary, it would seem that the Mexican Congress, when it enacted the law of April 4, 1837, rather supposed they might repeal section 11 of the act of April 6, 1830, and thereby leave in force section 7 of the act of 1824. Certainly there is no intent or purpose shown by the law of April 4, 1837, to annul the previous colonization laws, and by continuing in force section 11 of the law of 1830 they refer directly to the act of 1824, and show that that was in their consideration at the time, and it was not their intention to repeal the whole law, but only so far as it might conflict with the act of 1827. If both those acts can stand together, there being no direct repeal of the first act, the court must construe them so that they will both be in force, and only the act of 1824 gives way whenever there is a direct conflict in some respects to that of 1837, and it is impossible to see how the latter act repeals the former one in toto, or any

part of it which would prevent the Governor from making a grant, because that is the soul of the act, and if it is destroyed, all must go.

The appellants also cite with confidence a paragraph in the opinion of the court in The United States vs. Coe, 170 U. S., 696, wherein Associate Justice McKenna, in delivering the opinion of a majority of the court, uses this language: "Between the date of the law and the grant in this case no regulations to be observed in carrying out colonization were established. On the contrary, by a law passed April 4, 1837, all colonization laws were certainly modified and may be repealed." The law was then copied in full in the opinion, and no further comment is passed on it. Justice McKenna does not say that the law was repealed, but only modified. It will be noticed that that was a decision wherein four of the justices of this court absolutely dissented, leaving a majority of only one to support the decision of opinion, and it will also be noticed that Justice Gray only concurred in the result. What may have been his differences with the majority of the court is not known. It is hardly to be presumed, however, that when he concurred in the result only that he went to the extent of saying that the large number of decisions of this court heretofore rendered holding that the law of 1824 and the regulations of 1828 were in force up to the 7th of July, 1846, in California, and necessarily up to the 18th of August, 1846, in New Mexico, were bad law.

It is further suggested to the court by the argument that when there has been such a long and unbroken line of decisions by the highest court in this country in reference to the title to real estate, in the Mexican territories acquired by our country, and under which large numbers of our citizens have invested their money upon the faith of those decisions being a rule of property, amounting to millions and possibly billions of dollars, certainly running into the millions in New Mexico, that this court will undertake to destroy this rule of property and cause those people who have invested their moneys on the faith of those decisions in grants which are unconfirmed to lose their investments and their property, and to lose confidence in the ability of

this court to enunciate a principle of law or construe a law in such manner that on the faith of the construction they can safely invest their means. It is hard to believe that this court will do so, and counsel for appellant does not believe that at this late day those decisions under which possibly a billion dollars' worth of property is now held will be overturned and a rule of property destroyed, and that the remainder of the unconfirmed grants, which are few in comparison with the confirmed, will be held for naught and the investors in them be deprived of their investments, made on the strength of this court's decisions, and the rule of property established by it. Palmer v. 24 How.

The law of April 4, 1837, being passed subsequent to the constitution of 1836, which is claimed by appellant's counsel, abrogated the offices of political chief, territory deputations and the territories themselves, certainly would be construed into a re-enactment of all the law of 1824 and the regulations, so far as they do not conflict with the law of 1837. The effect of that act is that they remain in force, except so far as they conflict with the act of 1837, and except so far as they abrogate the enforcement of the seventh section of the act prior to 1840. This construction certainly does not need authority for this court to sustain it.

The law of March 20, 1837, enacted under the constitution of 1836 provides in section 3, subdivision 3, as follows in regard to the duties of the governors: "To comply with and cause to be complied with, the laws and decrees of congress," etc.

In the fourth subdivision, also: "To also comply with and cause to be complied with the decrees and orders of the general government."

In section 2 of that act it says: "In each department there shall be a governor appointed by the President of the republic upon the nomination of three persons by the respective departmental council (junta) without the obligation of being governed thereby in the frontier departments, etc." The remainder of the sentence as translated is unintelligible, but is not important for this discussion.

By subdivisions 3 and 4 of section 3 it is made the duty

of the governor to comply with and to cause the laws and decrees of the congress and of the general government to be complied with. That certainly embraced every existing law and decree and every one that might be enacted, and it seems that by section 2, in the frontier departments to which New Mexico belongs. He was given supreme power, although he was given a departmental council, he was under no obligation to be governed by it. If anything can be said in regard to this constitution and the laws passed under it to carry it out, affecting the title to grants of the public lands in the frontier department such as New Mexico, it would seem that the action of the Governor in complying with the laws, was supreme. That he could act entirely in those matters of grants himself. That as he was not bound by the departmental council, or junta, his acts would be just as valid without them as with them, so that a grant in that view would become definitely valid as soon as the governor made it.

We contend, however, that this court has repeatedly and consistently held and decided that the law of 1824 and regulations of 1828 are in force, or were, in 1846, and that they were the only laws and regulations then in force We think, however, that upon the consideration of the argument for the United States, if we are to admit that the constitution and the laws passed under it of 1836 and subsequent thereto did affect the power of the governor to grant lands, then that power was enlarged and made much more extensive.

II.

The next proposition submitted by appellant is, "assuming the grant to be given and to have been made under the law of August 18, 1824, and regulation of November 21, 1828, as contended for by claimant, and as *held by this court*, this is not such a claim as the Court of Private Land Claims had jurisdiction to confirm, it not being a claim complete and perfect at the date of the treaty, nor one which claimant would have a lawful right to make perfect, had the territory not been acquired by the United States."

Under this proposition appellant starts out by quoting from the language of this court in Ainsa vs. The United States (161 U. S., 223) and The United States vs. Santa Fe (165 U. S., 714). Laying particular stress upon the language used in the Ainsa case as follows: "If the grant were not complete and perfect, the claimant could *by right* and not *by grace* have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States." And in the latter case, the language "an inchoate claim," which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891.

We conceive that by these decisions it is only intended to show that the claim shall be upon a title lawfully and regularly derived from Mexico by virtue of a warrant, concession or survey such as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, and that in so determining, the decree and decision shall settle and determine the question of the validity of the title and the boundaries according to the law of nations, the stipulations of the treaty, and the laws and ordinances of the government from which it is alleged to have been derived.

While this is slightly different from the act of March 3, 1851, it will be seen that it only differs in leaving out that the determination shall be according to usages and customs of former government, according to the principle of equity and the decisions of the Supreme Court of the United States, so far as they are applicable. That provision the court in that case says referred to the decisions in the Louisiana and Florida cases. It is true the words "usages and customs" are also omitted in the act of 1891, but their omission can amount to nothing because under that act only such usages and customs of Mexico could have been considered as had ripened into law by their constant and long use, or by their being acquiesced in, so that the use of the word laws is broad enough to include the use and customs which the court under that act would be author-

ized to consider, and when we leave out the reference to the decisions of the United States Supreme Court we only leave out those decisions which were rendered in reference to Louisiana and Florida. There can be no doubt but that every court, in order to be consistent, will make the same ruling and holding, under the same law, from the same country, as to the construction of the statute, although it is made in the case coming from a different part of the same country, being a different political subdivision.

The land court were therefore only restricted by the provisions of section 13, which we do not see creates any special limitation different from the act of March 3, 1851; that they have not included therein a direct provision that the courts shall be governed by the usages and customs of the government from which the claim is derived, or the principles of equity, or the decisions of the Supreme Court of the United States, so far as they are applicable. But such omission from section 13 of the act of 1891 certainly will not be construed to mean that this court shall not decide in accordance with the usages and customs of Mexico, or the principles of equity, or the decisions of this court, so far as they are applicable. If those words had been left out of the act of 1851, would that court still not have been compelled to regard the usages and customs of Mexico, the principles of equity and the decisions of this court so far as applicable?

The definition of usage and custom is: "A custom is said to be such a usage as by common consent and uniform practice has become the law of the place or of the subject matter to which it relates. It is law established by long usage. Usage, on the other hand, is an established method of dealing adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference to it." (27 A. & E. Ency. of Law, 702, and authorities cited thereunder.)

With this definition, which seems to have been approved by numerous authorities, can it be said that where a title is derived according to the usages and customs of a country, recognized in that country, that it is not the law of that

country, and according to the law of that country under which that title is given? It seems as if this should not need argument.

Why should not the principles of equity govern in these cases? Would we say it should not because the law does not say it should? What are the principles of equity? Nothing more than principles which are regulated by right and justice. If the government of Mexico has allowed grants of lands to be made under a certain form, and with certain conditions, and with certain restrictions in them only, and such practice should have prevailed and not be disowned or repudiated by the governor for a considerable time till they had become an established rule, would they not be estopped to deny them or the successor of that government be estopped from denying them? Would you say that, when the government of Mexico or of the United States had been guilty of laches, as the United States has as to grants in New Mexico by their long delay in establishing the court? Where the government of Mexico or the United States had repeatedly or for years recognized a certain procedure in regard to making grants, which may not have been exactly and literally in conformity with the strict technical language of the law, but where such grants had been recognized under both governments, and hundreds of them confirmed and patents granted thereon, would this court not take into consideration the equitable principle of estoppel against the government which had allowed its citizens, upon the faith of its acquiescence and positive action by confirming and patenting hundreds of other claims similar to it to invest their means in a similar title, relying upon the good faith of this government and of Mexico?

It is a rule of law well established that the courts will defer to the political and judicial authorities of other countries in the administration and interpretation of their own laws. (Cavazos vs. Trevino, 35 Tex., 165, and authorities cited.)

This court will take judicial notice of the manner of making grants in New Mexico and California and other territories formerly belonging to the Republic of Mexico of like situation, and will give full credit to the action of the

Fremont vs U.S.
7 How. 561.

political heads of that government in the way it interprets, executes and enforces the law.

Appellant's counsel seems to have found a veritable wonder in the expressions used by the chief justice of this court in the Ainsa case, to-wit, "By right and not by grace," and proceeds to argue to this court that that expression meant that wherever a grant was not perfect, where it needed something else to be done, such as a confirmation by the departmental assembly, that then it was a matter of *grace only*, if such grants should be confirmed by the United States. Was it meant by that expression that such grants only would be confirmed as an action of ejectment could be maintained on them against the government or only one which the government could not, by arbitrary action, take away? Evidently the United States attorney seems to think that if the government by its arbitrary will could defeat a grant, by refusing to confirm it, or by throwing it open to the public, or by disposing of it in some way to others, that then such grant should not be confirmed, because it would only be a matter of "grace" to confirm it. No one will deny that Congress could annul every equitable title, or imperfect title, by overriding the treaty stipulation, which it has the power to do, under the holdings of this court, in the case of The United States vs. Sandoval (167 U. S., 291). But has it the right to do so? Would it not be bound by the principles of equity as well as by the treaty, as well as by the laws of nations? Every unconfirmed grant could have been disapproved by Mexico, as a matter of public policy, or by an arbitrary exercise of power. Confirmed grants are complete and perfect. Surely this court did not mean by "grace" everything which the government might lawfully do, or by might refuse to do, but it is suggested that there was only meant thereby such acts as the government was under obligation, morally, legally or equitably to do according to the treaty stipulations or the laws of nations, or the laws of Mexico. A government may be under obligations to do a certain thing according to a treaty stipulation or the law of nations, and thus it is said it would be bound to do it, while, on the contrary, it being supreme, it may elect not to do it and absolutely refuse to

do it, and thus defeat the binding obligation on it under the treaty stipulations and the principles of the law of nations. Would it be said that the government was not bound because it had the power to refuse?

Under the eighth section of the treaty of February 2, 1848, Mexicans established in territories previously belonging to Mexico, and remaining for the future within the limits of the United States as defined by the treaty, were free to continue where they then resided, or to remove at any time to Mexico, "retaining the property which they possessed in said territories, or disposing thereof, or removing the proceeds whenever they pleased," and "in the said territories property at any time now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample, as if the same belonged to citizens of the United States." The question arises here, what is meant by the word property in that article of the treaty. "Property means something more than a fee simple title. It means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others."

The Supreme Court of the United States has in several cases defined what is meant by the term property, as applied to lands. According to said decisions, "the term property as applied to lands comprehends every species of title, inchoate and complete. It is supposed to embrace those rights which lie in contract. Those which are executory as well as those which are executive."

Soulard vs. The United States, 4 Pet., 512.
Dolasus vs. The United States, 9 Pet., 133.
Smith vs. The United States, 10 Pet., 329.
Figg vs. Snook, 9 Pet., 202.
Bryan vs. Kennett, 113 U. S., 179.

In Massachusetts compensation for private property taken for public use is not confined to lands held in fee, but

includes every valuable interest which can be recognized and enjoyed as property (14 Gray, 155). In King vs. Gotz, 70 Calif., 240, the court holds: "The mere possession of real estate is constantly treated as property."

The word property extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments Standing alone, the term includes everything which is a subject of ownership. (19 A. & E. Ency., 285 and 286 and notes.)

The purpose of making these citations and others in regard to the treaty is to impress upon the court the fact that the law under which the land court is acting, that is, which organized it, was passed, as held by this court in the Sandoval and the Santa Fe cases, to *carry out the provisions of the treaty* with Mexico. Then, to say the least, it must be construed in harmony with that treaty. Like any act of Congress must be construed in harmony with the constitution if possible. Of course, Congress has the right to ignore or violate the treaty. But this court will not hold that it has done so unless its acts are in direct conflict with the plain provisions of the treaty. Its acts must be construed to intend in good faith to carry out the purposes and intents of the treaty and all of its provisions, and particularly those provisions which look towards the protection of the property rights of the people, who were Mexicans at the time of the treaty, and more especially those who retained their Mexican citizenship, as well as those who, by the treaty, and a failure to retain their Mexican citizenship, became citizens of the United States. It is on these points that all treaties have been made with great exactitude, and their provisions have been most scrupulously insisted upon. It is laid down in many decisions of this court that upon a cession of territory from one government to another the people change their allegiance, but their laws and individual rights in regard to person and property remain the same. That a cession of territory does not change the relations of the individual to his property under the former government, but that whatever right he had under his former government he retains. That he is

protected in that by the laws of nations, and in the case of the cession of Spanish and Mexican territory to the United States, by the express provisions of those treaties.

When the treaty provides, as in the case of the cession of New Mexico, that "property of *every kind* now belonging to Mexicans not established there shall be inviolably respected," and that Mexicans established in that territory were free to continue there or to remove, "retaining the property which they possessed in said territories, or disposing thereof, or removing the proceeds wherever they pleased." How can it be said that this act, which provides for decisions of this court or of the land court to be in accordance with the stipulations of that treaty, does not provide for an adjudication of every class and character of land, which may have been acquired in any lawful manner or in any regular way, under the Republic of Mexico? Certainly the first subdivision of section 13 does not prohibit it. It says "no claim shall be allowed which shall not appear to be a title, lawfully and regularly derived from the government of Spain or Mexico."

It speaks of it as a claim. In Mexico all land, the same as in the United States, is supposed to have the title thereof originating from the general government. If a person has held land for more than twenty years, claiming it as his own, it being recognized by every one as his own, he exercising dominion and ownership over it, and during that period the government not having questioned his title, the presumption is that he has title in some lawful manner from the government. The act in question does not undertake to do away with presumptions. Wherever a presumption is created by the act or non-action of a government, that presumption, if it applies to land held for over twenty years, is the same as a direct title given by the government, and must be construed as a claim lawfully derived from the government. This is certainly the reasoning of the case of The United States vs. Chaves (159 U. S., p 452).

This subdivision of section 13 in no manner undertakes to ignore the treaty, but, on the contrary, directly recognizes it and provides for a confirmation of claims derived from the government of Spain and Mexico, in accordance

with the terms of the treaty. The entire argument of the appellant under this head seems to be devoted to the idea of proving to this court that if anything else was to be done to make a grant perfect, such a confirmation by the departmental assembly, a survey of the land or its specific location of it, when it was made by quantity in a larger area, then it was a grant which could only operate thereafter by the grace of this government or the Mexican government, and that in such case it should not be confirmed by the land court, but the decisions are uniform to the contrary of that proposition, and the act in this case, under which the land court was given authority, expressly provides for the confirmation of incomplete and imperfect grants, and that embraces every kind and character of imperfect grants, which was lawfully and regularly derived from Spain or Mexico, or which, under the treaty of Guadalupe Hidalgo, would be considered property to be protected according to the provisions of that treaty.

In Hornsby vs. The United States (10 Wall., 241) the court says: In "the interest which passed by the grant, whether it be regarded as a legal title, imperfect in its character, and to be perfected by subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate title, constituted property which the United States were *bound* to protect by the stipulations of the treaty of cession. The treaty provides for the protection of the rights of property of the inhabitants of the ceded territory, and independent of the treaty they were entitled to such protection by the law of nations, according to which, as stated by this court in Strother vs. Lucas (12 Pet., 436). 'The rights of property are protected even in the case of a conquered country, and are held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect.'"

"By the term property, as applied to land, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of Soulard vs. The United States (4 Pet., 511). When considering the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of

that territory should be protected in the enjoyment of their property. "It comprehends," said the court, "every species of title, inchoate or complete; it is supposed to embrace those rights which are executory, as well as those which are executive. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." "It follows from the rules herein expressed that the appellants possessed under the grant in this case, at the date of the cession of California to the United States, a right of property in the land granted, and as a consequence that their claim is valid." This grant was confirmed. There had been no juridical possession given, nor had the departmental assembly confirmed it, and it was alleged that the grantee had not been in possession or occupied it in any manner. It was made on the fifth day of May, 1846, just two months before the occupation of California by the American troops, when ours was made on the fourth of June, 1846, two months and fourteen days before the occupation of New Mexico. In our grant, juridical possession was given and the grantee took possession, lived upon it and occupied it. In that case there was no record of the grant, but the original grant was filed in the archives. In our case the original grant certainly had been in the archives. This court has decided and established the fact, of which it must take judicial notice, that many of the papers of those archives have been lost or destroyed, and that the appellee, if he has not produced the original from the archives, could give secondary evidence of it, and the testimony in this case is ample in that respect, although we insist in this case that it rather appears that the original grant which was deposited in the archives is the one which ha sbeen presented. Certainly there is nothing showing that it is not the one which was in the archives, but if it should be thought otherwise, the court must determine that the original grant was deposited in the archives. That many of the papers containing grants have been lost or destroyed, and that appellant has furnished secondary proof or evidence of the grant. In either event, we have com-

ernor by a decree of that day, in exercise of the powers with which he was invested by the supreme government, and in the name of the Mexican government, had declared and did declare the parties, owners in full property, etc. * * * in conformity with the law of 1824, and the regulations of 1828, subject to the approval of the departmental assembly, and certain conditions annexed."

The instrument purports on its fact to transfer a full title to the property solicited. If valid when issued it passed * * * to the grantee, a present and immediate interest in a quantity of land specified." The court in the same case, page 236, says:

"But it said that the grantees did not accompany their petition with a map of the land solicited, and that the governor did not make any inquiries as to the qualifications of the petitioners and the conditions of the land with regard to the regulations of 1828."

"It is true that the regulations provided for a map of the land solicited to accompany the petition, but a compliance with the provision was not exacted in all cases. The governors exercised a discretionary power of dispensing with it under special circumstances. * * * As was said in the Fremont case, in answer to an objection of a similar character, the court could not without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution." 17 How. 561.

This expression taken from the Fremont case and quoted in the Hornsby case with approval, is a declaration of this court that in construing these grants, the courts should not, out of justice to indivuals give to the Mexican laws, a more narrow and strict construction than was given to them by the Mexican authorities intrusted with their execution. That is to say, as quoted from the Texas authority, ut supra, the court will defer to the construction placed upon the laws of a foreign nation by the judicial and executive officers intrusted with their execution by such foreign nation.

In Hornsby vs. The United States, ut supra, 237, the court further says:

"It is also true that the regulations provided that the governor upon receiving a petition for land, should proceed to obtain the necessary information as to the qualifications of the petitioner and the character of the land. But they did not prescribe any particular mode by which this information should be acquired. It might be obtained by the governor from his own investigation, or he might, as stated in the regulations, *if that course were preferred*, consult the appropriate municipal authority, which was that of the district, whether any objection existed to making the grant. In some cases, as in the case of Sutter, the character of the petitioner, and of the land solicited, were matters of general notoriety. U. S. vs. Sutter, 21 How. 172. Sutter Case, 2 Wall., 563. The objection appears to proceed upon the idea that a former reference to the local magistrate from him was essential to give the information required. This course was usually adopted, but it was not essential. * * * * There is nothing in these objections which touches the validity of the instrument at the time it issued, and the clause subjecting the grant to the approval of the departmental assembly, did not prevent the title from passing to the grantees, upon the execution of the instrument. Such approval was not a condition precedent to the vesting of the title. "It will be noticed that the grant in this case itself was made subject to the approval of the departmental assembly, but the court, say that those provisions of the law did not prevent the vesting of the title."

Every objection which has been urged by the counsel for appellant in his long argument to show that a grant is of no validity because not accompanied by a map, or deseno, and because no investigation, as to the character of the grantee or of the land was instituted, is met by that case, which is almost the last of the California cases coming before this court. This case is very much like the Hornsby case. There was no map in either. The governor in his decree granting the property, refers to the petition and finds the existence of all the facts set out in the petition which are, that the grantee was a resident of Pojoaque, a citizen of the Mex-

ican nation, and evidently a farmer or ranchman as he said he had not sufficient land to furnish a fair subsistence for the support of his large family which he provided for. He solicited the land as having the advantage of containing fertile lands for cultivation, and water sufficient and whatever else which is needed to raise stock, and that it was public and unimproved land. The governor says that he was convinced of the good reasons set forth and of the truth of the petition, etc. Here is a declaration by the governor practically finding in favor of the petitioner all the facts alleged, every one of which, taking together, covered everything which is required even in case of an investigation.

The governor's residence was at Santa Fe. This land was within less than fifteen miles from that city. He may have been well acquainted with the land, probably was, but as the courts say, as in Hornsby's case, "something more than near surmises *at this day* are necessary to show that the recitals are false." The court will examine this case and they will find that the entire argument of appellant's counsel on this point, is completely answered by that case, which was decided in 1869, eighteen years or more after the act of 1851 went into operation.

Appellant's counsel in his long brief has suggested that there is no grant, but only a permission to take possession. We insist that the grant paper is a grant in effect, so far as was required by the regulations of 1828. The translation of the decree made in the surveyor general's office is an incorrect translation. We have inserted in this brief above, a correct translation, which taken in connection with petition for the land in the act of juridical possession, shows that the governor did what the regulations provided, that is, acceded to the petition.

III.

The next proposition submitted by appellant's counsel is: "Assuming that the governor had power in 1846 to make a grant under the colonization laws of August 18, 1824, and the regulations of November 21, 1828, the proof is insufficient to sustain this claim under the decisions of this

court in the California cases. Said regulations and the Mexican law not having been complied with in any substantial particular."

Under this proposition appellant's counsel has cited about every case on Mexican and Spanish grants decided by this court as well as many cited by the courts of Texas and of California. No two cases are just alike. They all differ from each other in the language of the petition, in the language of the grant, in the language of the juridical possession, as well as in the object and purposes of the grant, and the manner of complying with the terms and conditions of the grant, and the requirements of the statutes. Appellant's counsel seems to believe, apparently, that all the matter of detail or direction which is laid down in the regulations to make a grant complete and perfect to the smallest minutia, are essential prerequisites to the validity of a grant, but he misconstrues or misapplies the eigth sub-division of section 13 in reaching such conclusion. That clause is as follows:

"Eighth. No concession grant or other authority to acquire land upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and manner stated in any such concession, grant or authority to acquire land."

This does not refer to any of the requirements of the regulations of 1828, but simply refers to a condition or requirement which may be embodied in the concession, grant, or authority to acquire land. Evidently congress had in contemplation that when a grant or concession, or authority was given, under that clause, it should be construed that the condition which might be embraced therein was accepted by the grantee and imposed by the grantor so as to become a contract, every portion of which was essential to its validity and should be performed in order to make it binding. The entire argument of counsel under this head seems to be directed to the idea that any preliminary detail which was provided in the regulations of 1828, and which evidently were only directory, were matters

absolutely controling the acts of the granting officer who was charged with the execution of the law. Appellants insist that no map was presented with the petition, but numbers of cases say that that omission did not invalidate the proceeding. The map was only to show the location and shape of the land. When natural objects were given, specific boundaries pointed out, that gave every information which could be given by the presentation of a map. In Hornsby's case the court says: "The governors exercised a discretionary power of dispensing with it under special circumstances. No motive existed for insisting upon its presentation when the information which it was designed to impart was already in the public archives open to the inspection of the governor."

10 Wall. 241

In our case this information is included in the petition itself which points out the natural objects bounding the property. The property was in the immediate vicinity of Santa Fe, the political residence of the governor, and even within sight of the city itself. The governor was doubtless acquainted with the locality and the boundaries, but it is certain that he was satisfied with the description given. The presentation of a map which could in no manner aid the governor in reaching information about the land, beyond the description given in the petition, was not held to be an essential prerequisite to a valid grant. In Fremont vs. The United States, 17 How., 552, the petition which was presented by Alvarado, the grantee, expressly stated that he would not present a map or plat, but suggested that he would thereafter present one, but it does not appear that he ever did. That was a grant for ten leagues of land to be thereafter located at the place called Maraposa. No specific boundaries were given. No plat was filed, and yet the court confirmed the grant, holding that such matters were not essential prerequisites. Grant was never actually given in possession. It never was confirmed by the departmental assembly, and although it was given fully two years before the American troops took possession of California, it was held that the grant itself conveyed a title which could only be taken away from Fremont by virtue of a denouncement

under the Mexican government. Unless the same should be disapproved by the government of Mexico.

If there ever was a grant which was wanting in the specified preliminary proceedings, that was certainly one. But the court held that that was a lawful grant, and that the title was vested in Alvarado and by him in Fremont. In that case the court says: "According to the regulations for granting lands it was necessary that a plan or sketch of its lines and boundaries should be presented with the petition;" but in the construction of these regulations the governors appear to have exercised a discretionary power to dispense with it under certain circumstances. It was not required in the present instance. The reason assigned for it in the petition was the difficulty of preparing it. The land lying in a wilderness country on the confines of the wild Indians. This reason was deemed by the Governor sufficient, and the grant issued without it (yet there is nothing said in the Governor's decree making the grant about the plan or sketch required by the regulation); and in deciding upon the validity of a Mexican grant the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities. And as the Governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision in this respect was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of the plan did not invalidate the grant."

In Mahoney vs. Van Winkle (31 Calif., 579), Chief Justice Field, late associate justice of this court, delivering the unanimous opinion of the Supreme Court of California, speaking of the delivery of juridical possession under the Mexican regulations of 1828, said: "But this proceeding should not be legally taken at all until the concession had been approved by the departmental assembly, and such approval was often delayed for years. * * * But

in time the practice grew up of issuing the final title papers without waiting for the approval of the departmental assembly, and as juridical possession should not regularly be made, previous to such approval, a *provisional* possession of the entire tract designated was permitted. See Pico vs. United States (2 Wall., 279) to the same effect.

Justice Field will be recognized as having been among the best informed lawyers on Mexican and Spanish land titles. His decisions were entitled to great weight. They are highly regarded by the profession throughout the entire western country, where these Spanish and Mexican land titles extensively prevail. His decision in the case last cited is an exact statement of the condition that existed in New Mexico during the rule of the Mexican government in that territory as to the practice of making a juridical possession as soon as the governor made his grant. Might it not be that the governor's power in these territories had been enlarged, especially in New Mexico, which was situated upon the boundary or border of a foreign country, where the authority was especially conferred upon him as hereinbefore stated, to act either with the council of the department or to act independently of it, as he saw fit, it being expressly stated that he should not be bound by it?

2. Act of Feb 20. 1837.

Appellant also insists that the petition does not state the profession or business of the petitioner. The petitioner was a mere resident of Pojoaque. He states that he was possessed of a small amount of land, but it was not enough to enable him to maintain the large family which he supported, and that he therefore wanted this grant, which had agricultural and grazing lands sufficient for all his needs. The party sets out his residence and his nationality; probably or possibly had no particular occupation or profession except that of a resident of the country, with a small lot of land and a large family to support, and a desire to obtain land for cultivation and grazing purposes, which would meet his wants. Does he not thereby practically set out that he was an agriculturist and stock raiser? It is not necessary to state identically the words by name, giving the occupation or profession of an individual, if you state what he is doing, or what he purposes to do, and the means with

which he purposes to do it. We think he has stated sufficiently well his profession, so as to give the Governor all the information he required. Such facts stated in the petition were not essential to enable the person to take a grant to the property. It is only for the information of the Governor, to enable him to determine whether the applicant was a fit and suitable person to have a grant of such a tract of land. For instance, if he had been a priest, his calling, probably, would not have suited him for such a grant, and while the Governor could make him the grant, he might think it impolitic to do so. He might be an alien citizen of the adjoining foreign country, and for that reason might not be deemed by the Governor a suitable person to introduce into the place. His name was required in order to identify him, but the Governor would naturally know persons residing in the vicinity of his political residence, know what business they were engaged in, know what was their occupation, profession or calling. If he personally knew them or knew the profession of the individual there would be no necessity for the fact to be stated, because it served its purpose as soon as it informed the Governor thereof. The Governor determined in favor of the facts as stated, and that the reasons given for making the grant were proper, as the statement of the profession was only for his information, he being in all probability cognizant of the facts, dispensed with them or considered the facts set out in the petition as giving him sufficient information on that subject. This objection to the grant certainly is of the narrowest and the most technical kind.

The appellant insists that it was the duty of the political chief to obtain immediately the necessary information as to whether or not the conditions required by the law of August 18, 1824, both as to the land and the appellant, are found in the application. The counsel for the appellant has evidently been indulging in the translation of those regulations, which was made for Mr. Reynolds in his book. Those regulations are quoted in the Hornsby case (10 Wall., 231), and the third section as there translated, taken from Rockwell's Spanish and Mexican law, is as follows:

"The Governor shall proceed immediately to obtain the

necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may be at once attended to, or, *if it be preferred,* the respective municipal authority may be consulted whether there be any objection to making the grant or not."

What does this section mean? It says the Governor shall obtain the necessary information, whether the petition embraces the requisite conditions required by law, as regards the land the candidate, in order that he may be attended to. Certainly if the Governor knew the facts himself that would be sufficient. If by looking into the petition he could see that the essential requisites were set out, or he could cause his legal adviser to examine and ascertain whether it was in conformity with law, would not that be sufficient? And whether he acted upon his own information, his own personal inspection, or the report of any one else, it was only for his information; that is, as to the character of the land and the character of the applicant. If he determined that the land was of such character that it could be granted, and the applicant was the proper person to receive it, and he could ascertain those facts from the petition or knew them independent of the petition, was not his decision or determination of that absolutely conclusive? An analysis of that section only shows that he was to be satisfied. No particular course of procedure was pointed out that he should take, when he was satisfied everything was complied with. There is a subsequent clause in the same section which says, *if he prefers,* the respective municipal authority might be consulted as to whether there was objection to making the grant. Surely it cannot be contended that he was compelled to do that, when it was only left to him as a matter of preference. It does not need argument to show that that proposition of plaintiff's counsel is a pure begging of the question. Yet they urge this to this court as if they were absolutely serious in believing that it was an essential prerequisite to the making of the grant. The Governor may have had all the knowledge he required on that subject, and did not prefer to consult the municipal authori-

ties as to whether there was an objection, as also he may not have wished or needed any "informe," that is, report as to the other matters. There was nothing required of him to secure such report in the section. Some of the authorities cited by appellant's counsel take up all of the different items specified in section three of the regulations, to be done by the petitioner, and say they are necessary to making a complete petition, as they are suggested in the petition, or rather in the section in regard to the petition. Of course, if they are all set out in detail, there would be no suggestion as to a defect in the petition even by the learned counsel of the appellant, but none of the authorities go to the extent that they are all absolutely essential prerequisites, the absence of any of which renders the petition for a grant invalid and fatal to the claim. The Governor of New Mexico was to construe that act or regulation. He did construe it, and construed his duty under it. For eighteen years, from the time said regulation was adopted and published to the time New Mexico was ceded to the United States, both in the Territory of New Mexico and in California, the governors in a majority of the cases construed that act by dispensing with some of those formalities set out in that section, either treating them as merely directory, as they really were, or, because they were possessed of themselves, of the information which that section required they should obtain. It cannot be said that Governor Armijo did not obtain the information specified that he might obtain; on the contrary, he was surrounded at Santa Fe by people and officers well acquainted in that section of the country who could have given him the information which he required. Anto Sena and Ramon Sena y Rivera, both officers of the government, were present at the time. But the first part of that section only requires him to investigate or ascertain whether the petition contains the necessary information to authorize him to act intelligently and for the public interest. The second part of it is entirely discretionary in its terms, and requires of him no duty which he might not prefer to perform. Appellee insists that these are not mandatory provisions, but merely directory. Any decisions whatever heretofore rendered to the

contrary. The cases of Hornsby, Fremont and Reading before cited, and many others, all show or decide that these provisions were not prerequisites absolutely essential to a valid grant. Some language may have been used in some of the cases in an unguarded and incautious manner which might lead to such conclusions, if the facts in those cases only were to be considered, but every case being different in its language, terms and provisions, the circumstances surrounding it being also different, the remoteness of its location, that is, the land, from the political home of the Governor, the improbability under the state of facts, which may be set out, that he could have personal knowledge, or that he could have made inquiry, might all make some difference, but still, we come back to the fact that those provisions were not mandatory, and cannot be construed to be mandatory under any fair construction of that law. That law must be construed in the manner it was construed in Mexico and by the Mexican authorities, and particularly by the officer who was intrusted with its execution, and as there are so many instances, both in California and Mexico. Probably there was hardly a case or grant in which each and every one of those directions were followed to the letter in the writings. Is it not reasonable to suppose that some complaint, somewhere, would be found in Mexico and by its authorities against such alleged loose action, as the counsel for the appellant would have you to believe it was? But not a word nor a line or a scintilla of objection anywhere can be found, either on behalf of private individuals or public officials. The acts of these governors in considering the contents of the petition or what should be done upon its presentation, was absolutely and unqualifiedly acquiesced in by every one in Mexico, in or out of authority. A custom and usage which took the form and substance of law was thereby established.

The next proposition presented under this head by counsel for appellants is that the decree of the Governor did not make any grant of the land, but merely provided for giving possession. Appellee does not agree in any manner to this proposition.

To understand the action of the Governor in this case,

and what is meant by his decree, we refer to the regulations as printed in Rockwell's mining laws, and as set out in full in Hornsby vs. The United States (10 Wall., 224) Article 4 thereof, on page 231 of 10 Wall., is as follows: "Fourth. This being done, the Governor will accede, or not, to such petition, in exact conformity to the laws on the subject, and especially to the before mentioned one of the 18th of August, 1824." It will be noticed that this article does not say that the Governor shall grant the land or not, but says he "will accede or not to such petition." The word used in the Spanish language, and which is translated into the English by the words "will accede," is *accedera*, which means exactly in the Spanish language what our word accede means in English, with all of its changes and variations, in whatever connection it may be found. It comes from the Spanish word acceder, meaning to accede. The form used in the regulations is the third person singular of the first future tense. This word, however, has been translated into Reynold's Spanish and Mexican Land Laws by the words "shall grant," so that the fourth section as translated into Reynold's Land Laws is as follows: "Fourth. In view of all of which, the political chief *shall grant* or not said application in strict conformity with the law applicable to the matter, especially with that of the 18th of August, 1824, already cited."

The translation of these regulations has existed in Rockwell's Spanish and Mexican Law on Mines and Real Estate ever since the publication of that book in 1851. This court has ever since that time adapted and acted upon that translation, as being a correct translation of that law, and we think it is rather late to make out a new edition of that law when nearly all of the land claims have been settled in New Mexico, and all of them in California. Besides, we believe the translation of Rockwell is the better translation of the two. It will be noticed that there is a great deal of difference in the translation of both articles 3 and 4, between the regulations as contained in Rockwell and as contained in Reynolds. Besides, this court in Hornsby vs. The United States (10 Wall., 231) adopted substantially Rockwell's translation in the statement of that case, and the

counsel for the appellee, being somewhat versed in the Spanish language, of his own knowledge is satisfied that the translation in Rockwell, as copied into Hornsby's case, is the correct translation.

It thus appears that all that is required of the Governor is to "accede" to the petition or request. That is to say, he agrees to what the petitioner may ask, and gives him the possession necessary to enable him to control the property. In order to ascertain the meaning of this decree, which is very similar to most of the decrees granting lands, as we will show in the Territory of New Mexico between the years 1820 and 1846, the petition in this case made by Juan Luis Ortiz is in our judgment acceded to by the Governor without any doubt. It says "that desiring, through the most legitimate and proper means, to encourage agriculture, so much recommended by the laws, and finding myself at this time with land so considerably restricted as not to furnish a fair subsistence for the support of the large family I provide for, and having seen and examined with great care a tract of public land which is situated near the place of my residence, which I described to your excellency under the following boundaries: On the east by a mountain called the Mosca or Panchuelo slope; on the west one-fourth of a league below the waterfall on the little spring meadow; on the north a little flat mountain and some arroyos running between the north and west; on the south a rocky hill, situated above the Chupadero valley, or boundary of the citizens of Tesuque River, and finding in the said tract (terreno, meaning land) which I solicit of your excellency the advantage of containing fertile lands for cultivation, pastures, and water sufficient, and else which is needed necessary for raising stock, and satisfied as I am that it is public and unappropriated land (terreno), as I have already stated, I have not hesitated to apply to the justice of your excellency, asking very respectfully that for the sake of justice you be pleased to grant to me the said possession (la referida posesion), which I ask in the name of the Mexican nation, to which we have the honor to belong."

This petition asks for a grant of the "said" possession, meaning

tract of land referred to. The Spanish word which is translated "said" is the word referida, and means referred to. There is nothing referred to except the tract of land of which the boundaries are stated, and the word possession is not meant in the sense of a mere possession of land to be held, but it is used in the sense of a possession or a thing which is one of the possessions of an individual, belonging to him; that is, it is used in the sense of an object here as being the tract of land described. This is easily observed, as the English translation, which is not good, but is sufficient, speaks of it as "said possession." It does not ask that he be given possession of the land, but it asks that he be given *said possession*, referring to something that preceded, and as the word possession may mean the act of holding a thing simply, without ownership, or as used in the English and the Spanish languages alike, but more frequently in the Spanish, it may mean the object about which the communication is addressed. In this case, there is no question but that it means the tract of land itself. In Spanish it is very common, especially in Mexico and New Mexico, for the expression to be used, "my possession" or "my possessions," meaning thereby, my property, or my properties, such as he has actual dominion over by title.

We call attention to this condition in the petition so that the court may see every phase of this grant. We have prepared a new translation of the granting decree, which we are satisfied is nearer correct than the one taken from the Surveyor General's office. The original Spanish of that decree is the evidence, and appellee's counsel insists that when that decree is read, according to its true intent and meaning, no other conclusion can be reached than that it was the actual purpose and intent of the Governor in giving it to "*accede*" to the petition; that is, to agree or concede, or give, if you please, whatever the petition asked, as well as agreed to the facts stated in it. It embraced more than a mere making of the grant. It meant that the Governor should find that the facts were properly and truthfully set up in the petition, which would justify the making of the grant according to the law. He accedes to the proposition, that the petition embraces what is proper, and that the

facts therein are correct, and that the party should have the property prayed for. If the word "accede" had been used there could be no further controversy on that proposition, but instead the Governor used a different expression, but which embodies the same meaning and idea. In Spanish his decree is as follows:

Santa Fe, Junio 4, 1846.

"Siendo ejecutivo lo que expone el presentante en la antecendente instancia, solicitando se le mercene el terreno valdio q. dissena en la misma, y conbensido este Gobierno de las justas razones que espone para el peticionario al juez a quien corresponde para que lo ponga en posesion del terreno solicitado con total arregio a las leyes de la materia.

"ARMIJO.

"JUAN B. VIGIL Y ALARID, Scrio."

Which we translate as follows:

What the petitioner represents, in the foregoing document (instancia), soliciting that he be granted the public land, which he describes therein, being a matter to be carried into effect without further delay (siendo ejecutive), this government being convinced of the justice (or correctness) of the representation (justas razones) made by the petitioner (he is directed) to the justice (juez), to whom it corresponds that he may place him in possession of the land solicited in entire conformity to the laws on that subject.

The words "siendo ejecutivo" at the commencement of the decree are the controlling words, but are to be taken in connection with all the balance of the decree to more thoroughly understand their meaning. They are translated in the translation embodied in the record by the words "being true," the first word meaning being, being the present participle of the verb to be; the second word, "ejecutivo," being translated by the word true. That is neither its literal nor its ordinary meaning. In the sense in which it is used in this decree it embraces that in its meaning, but that is not the whole of its meaning. The expression means that the Governor had not only found those facts to be true and properly represented in the petition, but he found that they had reached the point where the petition was to be

carried into effect, according to the statement in it and the prayers thereof. That is, he found the truth of everything and acquiesced to it, and that it was ready to be executed, and thereupon, with that expression, which embodied the truth of everything that was stated, the correctness of the petition and the acquiescence or agreement to the grant, as prayed for, and stating further that he was convinced of the correctness of the representations (justas razones) made by the petitioner, he accordingly directed the corresponding justice to give the possession. That is all he could tell the justice of the peace to do. He could not delegate his authority to the justice of the peace to make the grant, but only to give possession of the land. That is, juridical possession, using the word "terreno" to express the meaning land. Considering this whole decree in connection with the petition, no other conclusion can be reached than that the Governor did thereby accede to the petition, that means the *whole* of the petition; what was stated in it by recital, as well as to what was prayed in it in behalf of the petitioner. In referring the matter to the justice of the peace to give possession, there is no word used to express refer or directed, as we insert in brackets in our translation, but the words used are simply "al juez," meaning to the justice. This is a form that was very often used by Armijo and other governors. We will here mention a few instances of this way of making a grant, showing that it was customary in New Mexico, from 1820 to 1846, to use some such language.

In claim No. 25 John Lamy, which was the grant made August 20, 1820, and was confirmed by Congress, the granting clause was as follows: "Al Alcalde constitucional de la Eleccion para que oyre con arreglo de le por lo respectivo a los de fuero ordinario dirijiendo nota de los del fuero de guerra a este gobierno con los documentos correspondientes para obrar como corresponda."

Which, translated, is as follows: "To the constitutional justice of first election, who will act according to law in reference to ordinary privileges, transmitting to this government a note of those entitled to privileges of war, together with the corresponding documents, in order that the

necessary steps be taken." That was treated as a grant, and it was understood in that, as well as in many other grants, that the words "al alcalde," in our case "al juez," should be preceded by the words, "granted as prayed for," and referred to the justice. That those words were understood.

In the grant to the people of Chillili, was made in the year 1841 by Armijo, Governor, and in Spanish was as follows:

"Al sor. juez de la. Instancia del 3er. distrito judicial D. Ant. Sandoval, para que en atencion a la pobreza que es notoria tienen los solisitantes y que este Gobierno esta bien informado y dicho juez pondra en posesion segura a los solistantes del terreno que solisitan," etc., which, translated, is as follows:

"To Don Antonio Sandoval, justice of the first appointment of the third judicial district: That, taking into consideration the well-known poverty of the petitioners, and that this government is well informed of the fact, said justice will place the petitioners in secure possession of the land they ask for, etc."

This was a grant, and the words were understood as follows: *"Granted as asked and directed to, etc."*

In the grant of Pedro Armendariz, made in June, 1820, the decree of Governor Mulgarus was in the following words:

"Respecto de que no creo in conveniente, como lo pide bajo las condiciones del decreto de balverde," which is translated "as it is not deemed inconvenient, as he requests, under the same conditions of the decree of Balverde." This was held to be a good grant, as was also that of Chillili. The words "granted as prayed for" were understood to be included before the words "as he requests." The three grants mentioned were confirmed by Congress after being favorably decided by the Surveyor General. In 1843 a grant was made to Vigil and St. Vrain, on December 9, and was in the following language:

"Al quez de paz a que corresponde para que de la posesion a que se refieren los presentates pues este Gobno.

Desea que se fomente la agricultura y las artes," which was translated:

"To the justice of the peace of the proper jurisdiction, who will give the possession referred to by the petitioner, as this government desires to encourage agriculture and the arts." The words "granted as prayed for" being understood as preceding the words "to the justice, etc."

The grant to the town of Tijique was made in about the same language, and made in 1834; it and the one preceding it were both confirmed by congress and by the Surveyor General.

In 1843 Armijo, on December 30, made a grant to Lee and Baubien in the following language:

"Pase al prefecto para que si el terreno que si solicita no tiene embaraso aga que si de la posesion a que se refieren los presentantes," which is translated as follows:

"Referred to the prefect, in order that if the land petitioned for be not otherwise disposed of, he cause the possession referred to by the petitioners to be given. This grant was approved by the Surveyor General and confirmed by Congress, and embraced in it over 800,000 acres.

On May 7, 1846, less than a month prior to the making of the grant in question, a grant of five leagues was made by Armijo to John Scolly and others, and the granting decree as translated reads as follows:

"To the justice of Las Vegas: That he may proceed to place the petitioners in possession, setting apart such lands for cultivation as they may be able to cultivate," etc.

It was understood that the words "granted as prayed for" were understood to precede the reference to the justice of the peace. That grant was also approved by the Surveyor General and confirmed by Congress.

The foregoing selections have been made so as to cover the period between the Mexican revolution and the cession of New Mexico to our government, but there are many of the grants during that period which were made by the same words, none of them using the word grant, but simply stating to the justice of the peace or alcalde, as the case might be. Those people receiving the grant were always respected from the dates thereof as the sole and exclusive owners

thereof, and the Surveyor General decided that they were good and valid grants in favor of the grantees, and segregated the lands from the public domain. Each one of those before referred to specifically was confirmed by the act of Congress dated June 21, 1860. They have been cited because they have been adjudicated by the Surveyor General and acted upon by Congress, and are in a condition that this court will take judicial notice of them. And they are here referred to to show the court what the customary form of grant in New Mexico was, and that they were in question while under consideration, and were as full as that custom required, and we think much stronger and more exact.

This seems to have been a form of grant which very extensively prevailed in New Mexico, even under the Spanish regime. It is true that all of the grants were not in this form. Some of them were very full and complete. Some of them were even less exact in their language than these cited. The counsel for appellant claims that this grant under consideration was only a grant of the possession of the land, but the grant of the petition, all the authorities say, must be construed together to ascertain the meaning, and when taken in connection with the language of the regulation correctly translated, including a correct translation of this decree, it is difficult to see how a mere *possession only* was given. It is not to be supposed that the Governor would act outside of the purview of every law. There was no law which authorized or justified the giving, by grant, of a mere possession. In California, there are a few cases where the Governor permitted a party to search for lands, such as he might need, but required him to report to the executive and file the requisite papers or petition for a grant if he should find such lands. But nowhere, it is believed, can it be found that they went to the trouble of granting a mere possession. Evidently the petitioner in this case wanted the land. He solicited the land, and asked that it be granted to him. Gave his name, his residence, and his nationality, and what he was doing, and wished to do, showing that he was taking steps directly under the provisions of the regulations for making grants, and not for the purpose of acquiring an uncertain and indefinite possession.

Governor Armijo is criticised for his apparent haste in making this grant at a time, it is said, after war was declared, and when, as counsel says, the drums of Kearny's expedition could be heard, almost. History tells us when Kearny's troops assembled at Leavenworth, and when the first portion or advance guard started from there westward it was on the 27th day of June, 1846, twenty-three days after this grant was made, and nineteen days after the possession was given. It will be supposed that Kearny made reasonable speed in crossing the plains. It took him fifty-two days to reach Santa Fe from Leavenworth, so that for Armijo to have heard of this expedition it must have assembled or have been known at least as early as the 6th of May, 1846. But this court has decided that the mere declaration of war did not affect the right of a governor to make a grant, or the validity of a grant made by him after the declaration of war should have been made. Armijo had the right to make this grant. The grantee had the right to take it. One grant in California was made within fifteen days of the time the American troops took possession of California, on the 7th of July, 1846, and was actually confirmed by the departmental assembly on a subsequent day. The court held such grant to be valid. Appellant's counsel intimates that no grant made after some time in May could be valid, but this court has decided [illegible] in more than one case, from California, that the time when the Governor of California ceased to have power to make grants was the 7th day of July, 1846, when the American troops took possession of the capital of that country. According to that decision, the time when the Governor of New Mexico would cease to have such power would be on the 18th day of August, when the American troops entered Santa Fe.

Appellant's counsel insist that the claim in this case is for 115,000 acres. We make no such claim. It is true that the sketch map, which was filed in the office of the Secretary of the Territory, gave the form of the grant to be nearly that of a square, and headed it, "Containing about 115,200 acres." But after that was filed, and after the Surveyor General had heard the testimony and decided

the case, the government caused a preliminary survey to be made of the grant, which only gave about 33,000 acres as its area. Much less than a third of the amount the government counsel insist upon making out as the area of the grant. This is done in the way of an argument to a jury, with the idea of exciting the prejudice of this court against the grant. We do not claim, and do not expect, and do not ask, this court to give us any grant which can exceed eleven leagues, and we believe that the limitation which the land court put upon it is a correct limitation.

Counsel for appellant have also urged before this court that the evidence shows there was another grant which conflicted with this one at the time Armijo made this one. He is well aware of the fact that that grant was notoriously a fabricated grant, and after proceedings were commenced for its confirmation before the Court of Private Land Claims it was so obviously a forgery that it was abandoned. It is through that alleged forged grant that the government gets nearly all of its witnesses. They were heirs at law, under that alleged or forged grant, if it had been a genuine grant. They believed that it was a genuine grant, probably not knowing the facts of the forgery, it having been manufactured by a Polander, who was afterward around buying up for a mere song the interest of the supposed heirs. Knowing the fact that that grant was an unmitigated forgery, it seems that the attorney for appellant ought not, without informing this court as to the true facts, insist that there was actually a conflicting grant, and that therefore Armijo ought to have caused an investigation by the local authorities to see if there were objections. The grant was a forgery. While it was probably forged after Armijo's time, he knew there was no such grant there, and knew that there could be no such conflict. We do not think that this court should be misled, or an attempt be made to mislead it, by failing to state a portion of the facts connected with the matters relied upon to beat this case. The counsel for the appellant claim that there were only two witnesses to establish the genuineness of the grant in question. There were two who were actually present and saw the granting decree signed. Two others who were

acquainted with the handwriting of the parties and swear to their belief of the genuineness of the signatures. Eyewitness to a signature at the time it is made is the best evidence. The next best evidence is that of persons who have seen the party making the signature write, so that they have become acquainted with his handwriting and know it, from their own personal observation. That is second in degree only to the person who saw the signature made. The last and lowest degree of evidence is that of a person sometimes called an expert, who never saw the party write, but who has been shown writings which are proven or admitted to be genuine, and who makes a comparison of them with the handwriting in question, and gives his opinion or judgment as to the genuineness of the writing under investigation. This is entitled to no weight when confronted with either of the other classes of evidence. It is of a very low order, and is never accepted or received except in the absence of any witnesses to testify that they saw the party write the signature in question, or that they had frequently seen him write, and from that fact are acquainted with his writing, and are able to distinguish his signature and testify to its genuineness.

Counsel also criticises the case of the claimants because the two principal witnesses to the signature, those who actually saw it made, happen to have been sons-in-law of the grantee. Why should that criticism be had? Neither one of the parties, at the time he testified, had any interest in the grant, as they both stated. Gaspar Ortiz y Alarid had acquired all he interest they may have had through their marriage or otherwise, but the fact that they were present when the grant was made is a very natural circumstance. They were officers of the Government. Men who were well informed. Without doubt stood well with the Governor. The grantee knew them, had confidence in them, and requested them, or at least one of them, to go with him to the Governor when he asked for the grant. He may have been a man possessed of more intelligence than the grantee, or the grantees may have taken them along as public officers to inform the Governor as to the correctness of his statements in his petition. A man is not to be criticised for

associating with his relatives, and those relatives are not to be criticised as witnesses because they testify as to facts which take place while they are in his company. As a general rule the most constant and frequent associates of an individual are his relatives. If he wishes to account for his whereabouts on a given occasion, or his doings or actions at any specified time, should he be precluded from doing so because he was in company with his wife, his son or daughter, his brother or father, or an employe, to the extent of depriving him of the evidence of such witnesses. These witnesses gave their testimony on an investigation of this case before the Surveyor General. He heard them orally, saw their conduct, manner and bearing on the witness stand. Some of them were cross-examined, and he gives his opinion that they are worthy of belief, and upon the strength of their testimony he decided to approve the grant for confirmation, and so recommended it to the Congress of the United States. The land court did not see those witnesses, because, on account of the long delay of the government in organizing this court, and in bringing this case to trial, in 1896, fifty years from the time the grant was made, all of the eye-witnesses, all of those who knew any of the facts personally, including the four witnesses who testified to the signatures, had died, but their testimony was fortunately preserved. The counsel for appellant has cited many cases, every one different from the other in facts and particulars. As a sample of one he has cited the case of Pico, in 2 Wall. There was actually no petition, *nothing* preceding the grant. A bare simple grant, apparently made by the Governor on his own motion, without being solicited. The court well held that it was void.

See Larkin Trans. 561.

The attention of the court is called to the fact that no objection was made to the grant when it was introduced, because it did not contain an actual grant of the land, or because an investigation had not been made, as shown by the grant, or that the grantee was not a qualified person to take the grant, or because no information was called for or no reference to the municipal authorities or anything else, except what was called a formal objection to the grant, its custody not being accounted for, and its genuineness not

being proven. The custody of the grant was fully accounted for. It was brought from the archives in the Surveyor General's office, and it was either the copy, which was given to the custodian of the archives to be placed in them, or it was the one which was given to the grantee. If the latter, then the one which was placed in the archives was shown to have been lost, and this court has decided judicially that the fact existed which would justify the introduction of secondary evidence. If the grant in question is the latter, that is, the one given to the grantee, it is shown that he received it from the Governor. When he died his son would be the natural custodian of it, and that son, it is shown, is the one who filed the claim before the Surveyor General asking for the approval of the grant, and if he then presented the copy which is in evidence, certainly no better evidence of the custody of the grants could be required. This brings us to the discussion of the genuineness of the grant.

The last proposition of appellants is that "the muniments of title under which the grant is claimed are shown to be spurious."

They first allege that the grant is not on stamped paper, and cite the laws of Mexico, from volume 4, Dublan & Lozano's Collection 153, section 13. Section 1 of that law provides that there shall be five grades of stamped paper. The first of $8.00, the second of $4.00, the third of $1.00, the fourth of 2 reals, or 25 cents, and the fifth a real and a half real. The first class is used on documents and donations where the value is $2,000 and upward. The second is used on such papers where it does not reach $2,000 in value. For a failure to present such document without being on stamped paper, a penalty of three times the value of the paper is imposed, and there is no other penalty fixed. This law is not like the statute of the United States, allowing you to fix a certain stamp to any kind of paper, but it requires the document to be on stamped paper. It is argued that there was stamped paper in New Mexico on the fourth of June, 1846, and that Antonio Sena's evidence is not to be believed when he said there was no stamped paper. Taken literally, that might be true, but Antonio Sena's evi-

dence in regard to there being no stamped paper was given in regard to this grant or donation, and was with regard, of course, to the stamped paper of the corresponding denomination; that is, either of $4.00 or of $8.00.

It will be noticed, page 78 of the record, that in the petition for the grant, one Luis Ortiz says: "My petition is not upon paper of the proper stamp, there being none in this city;" or, better translated from the original on page 72, it says: "My application is not made on the corresponding stamped paper, because there is none in this city," and then he adds: "But I promised to attach it, cancelled, as soon as there shall be any."

The prosecution refers to the fact that a paper, No. 1143, referred to in Tipton's testimony, was on stamped paper, and therefore there must have been stamped paper in Santa Fe. That paper was not of the denomination required for this grant, or, as the grantee says, of the corresponding stamp. It is on two reals or less, but no more, which was either of the fourth or fifth class, while this grant required either the first or second class of stamped paper of the denomination of either $8.00 or $4.00. It was the custom in New Mexico, as wide as the practice existed of making documents when there was no paper of the corresponding stamp, for the party to state that fact at the foot of the paper, and offer, whenever paper of the corresponding stamp should be obtained, to procure it and attach it to his other paper. That was accepted as the practice, and the universal practice. There was no penalty attached to the document on account of it not being on stamped paper, but a penalty of three times the value of the stamp was imposed if a paper was used without corresponding stamp. In this case they do not propose to use the paper without the corresponding stamp any longer than until they could get the corresponding stamp, and the same law required that stamps should be kept in the departments. The only additional obligation for *use* of a stamp on the paper is that it necessitated the proof of the genuineness of the signatures. The document being upon stamped paper, it seemed that the law or custom made it proof itself, without further proof.

Gonzales vs. Ross, 120 U. S. 624.

In the case of Bouldin vs. Phelps, 12 Sawy., 308, was a case between two individuals for the possession of a tract of land claimed to have been made or granted to one of the parties by the Governor. It was a suit brought after the time had expired within which parties claiming under grants from Mexico or Spain could present their cases to the commissioners in California under the act of 1851. The court held, not that the grant was void, but that the grant was not perfect; and also, that it was an equitable grant or an equitable title, but that not being perfect, and never having been presented to the commissioners for confirmation, it had therefore been abandoned, and could not be maintained as a perfect title, independent of the law of 1851 on which to base an action in ejectment, and the whole of that decision is simply to the effect that the grant was not perfect, and not having been presented for confirmation, it had become barred and lost as a title. It is true that it is intimated that the grant, not being on stamped paper, is one reason why it is not a perfect grant, or a good title, but it does not say that for that reason it is not an *equitable title*. Besides, in that case, there was no statement in the petition that there was no corresponding stamped paper in the department or any offer to furnish it when the stamped paper might be in the department, and thereby comply with the law, as in this case, but on the contrary the court find in that case that there was corresponding stamped paper in the department at that time. We insist that the statement in the grant petition that there was no corresponding stamped paper, and the evidence of Sena testifying about the grant itself, that there was stamped paper in the department, meaning, of course, that there was no *corresponding* stamped paper for such document as the one on which the petitioner's grant was made, cannot be overridden or lessened, or discouraged, by the showing attempted by the attorney of the United States, in document 1143, that there was stamped paper of another or different class. That proves nothing whatever against this grant or the statements in the grant petition, and the testimony of Sena.

Defendant makes a long argument that war having been

declared between the United States and Mexico before this grant was made, has some effect upon the consideration of the bona fide of this grant. It seems that declaration was made only twenty days before this grant was made. Its knowledge could not have reached Armijo within that time. There was no telegraph line further west than St. Louis at that time. There was no regular mail between the United States and Santa Fe at any point. It took, in every event, more than twnty days to make the trip from Leavenworh, Kansas, to Santa Fe.

In United States vs. Yorbar, 1. Wall., 412, it is said that the fact that Mexico, through her commissioners, had declared that no grants were issued subsequent to May, 1846, does not affect a grant made by a governor having jurisdiction after that date, and before July 7, 1846. The grant was made after that date in that case, and it was confirmed by this court. Also in Stearns vs. The United States (6 Wall., 589), this court says: "The authority of Mexican governors to alienate public domain in California ceased on July 7."

It is true Armijo and the Governor of California were each required to report quarterly. When their quarters commenced or ended it does not appear. That would be determined possibly by the fiscal year which might be adopted. But suppose it is regulated by the calendar year, then Armijo would not have to prepare his report until the first of July, at which time he had certainly heard of the existence of the war, and the fact that General Taylor's troops had crossed the Rio Grande and were marching into the interior of Mexico. The battles on the east bank of the Rio Grande had already been fought. Matamoras and Monterey had both been captured, and Taylor was moving westward. It is not probable nor supposable that he would send forward a report to be delayed upon the road or to fall into the hands of the enemies, or that he would prepare one at that time when he was occupied getting ready for the war. But suppose he was required to prepare a report and forward it and that he did so. It is shown by appellant's brief that he made about the 6th or 7th of May, 1846, which has been confirmed by congress. If he sent a report

for that quarter, and that report is to be used against the claimants to establish the fact that this grant has not been made because he did not make any report about it, could not the government, with all of its means and power, and a diplomatic representative at the City of Mexico, easily have obtained that report? If Armijo made no report for that quarter, that would have been an argument according to the contention of the appellants against that other grant. Evidently, it was not on motion of the Mexican commissioners that the clause referred to was placed in the protocol or the proposed treaty afterwards, but the 13th day of May was insisted upon by the American commissioners as being the date of the declaration of war, and as the date upon which all authority in the territory ceded, should be considered as having ceased. The Mexican commissioners were seeking a peace document to rid their country of a foreign invader, and not only were willing, but compelled to agree to anything. Mexico, however, objected to the clause in the protocol and the proposed treaty and the senate amended the treaty by acceding to the objections of Mexico and straightened it out. So that if there is any argument to be derived from that, it will be that the government of Mexico as well as of the United States both agreed that that proposition was not true and they are both bound by that final agreement. Not only is that the fact, but the impossibility and improbability of any report from Armijo having reached Mexico, made after the 30th of June, 1846, is too great to place any weight to any such argument. From the 1st of July to the 1*th of August, when Armijo was driven out of this capital, he was exceedingly busy with his military operations, and naturally, would have sent no reports to Mexico, which might fall into the hands of the enemy, as Taylor's column was advancing to the interior, and at that time must have occupied one of the routes by which Mexico was reached from Santa Fe. The distance from Santa Fe to the City of Mexico by the then traveled route was about 1,600 miles, and Armijo had neither means nor men to spare to send off with an insignificant report as this. This argument appears to us as being frivolous, and this court seems to have given no

weight to it when it was not cited in the Yorba case above considered cited. Nor would the mere declaration, statement or consent of commissioners designated to prepare a treaty so as to get rid of the possession of a foreign nation, be in any country deemed legal or legitimate evidence, or a matter to be taken into consideration. It is true it is not introduced into evidence. It is a public fact of which this court will take notice, but when it does so take notice it must do so in the light of it being evidence in the case and in no other light. But as the Mexican government never assented to the proposition in the treaty itself on its final adoption, but did assent to striking out those propositions, evidently when the Mexican commissioners consented to it going into the protocol, they did so with their government under duress, and were compelled to accept whatever terms were offered to them by the American commissioners, in order to relieve their country from the burden of war and occupation by the American army, but the final settlement of that proposition was in effect an agreement that the fact stated in the protocol was not true.

Even though Armijo was a fugitive in Mexico, it cannot be supposed that he would have been consulted about the treaty when the government of Mexico was at that time pushing a vigorous prosecution against him for his failure to make a proper defense of New Mexico, and thereby lost that territory to their country. Those commissioners were not the government of Mexico in any sense of the word, but if they were, the declaration which they consented to in the protocol was absolutely objected to by the American government. As we understand, at the instance of the Mexican government, certainly it was consented to be stricken out by the Mexican government, and certainly cannot stand as an admission which would bind a grantee after he had passed under the control of another government.

By citing the Scolly grant, it was finally made on May 7, 1846, but which had been first presented as far back as March, 1843, the attorney for the appellants seems to think that because no other grants were made between May 7 and June 4, that therefore Armijo's action was hasty and inconsiderate, and done for the purpose of appropriating the

public lands so that they might not fall into the hands of the United States government. If there is any argument to be based upon that fact, and for that reason the grant in question should be considered spurious, we think that is a proposition which would cut much stronger the other way. Men who commit forgeries are generally intelligent, well informed, and understand what is necessary to be done to make it similar to the genuine. If they had been intending to forge a grant, without doubt they would not have made it the very last grant which was signed. They would have gone back beyond the time when war was declared, or at a time when there was no interruption of pacific relations, so as to remove any objection which might be made on that ground. In one breath the attorney admits the execution of the grant and denounces Armijo for his inconsiderate action in making it after war had been declared. He evidently gives Armijo credit for great foresight. That is, he must have foreseen that war would be declared, because he could not then know it. He must have foreseen that the American troops would occupy Sante Fe. The expedition had not even then been ordered, and he could not know it. He must have foreseen that New Mexico would have been ceded to the United States as the result of the war, and many other things connected with that war and the treaty, he must have known which ordinary mortals could not anticipate. It is folly to urge such propositions as that.

It is urged that the grant was not made to a prominent citizen. That it was for no consideration, and for no meritorious services. That the grantee lived in a small village, was a man of ordinary standing, and after 1846 clerk in his son's store.

In United States vs. Vigil, 13 Wall., 450, and in other cases, it has been decided by this court that the governor could only grant lands for settlement and agriculture. He could not sell them. He could not give them on account of meritorious services, nor for a consideration, nor for any other purpose than that of settlement and agriculture, and there is nothing provided in the law that they should be granted only to persons for meritorious services, but it was

evidently intended that the grantees should be from the vast body of the people, so as to induce the settlement of the public domain and its occupation by those people who were without means, to purchase lands and in order to develop agriculture, and this grant calls attention in the petition to that fact and bases the application for it upon that fact.

Certainly at this late day, and when the atmosphere is actually clouded with criticisms and abuses against the policy of this country and of those who hold power, charging them with favoring trusts and corporations and wealthy people, as against the poor and those of limited resources, this court will not adopt a construction of the acts of Mexico which will say that the governor could not make a grant to a man of only ordinary understanding in a small community, but that such grantee must have been a prominent citizen and one who deserved well of his nation. It is said it is incredible that he should grant away over 100,000 acres to such an individual. Again we repeat that the only survey made of this grant, and that by the government, shows only 33,000 acres, and we do not claim in any event that it claims over eleven leagues.

That the grantee subsequently, probably from 1851 on, may have clerked in his son's store is not significant. He was then an old man possibly. His children were married off and he was left practically homeless. He lived with his son during the last few years of his life wherever that son may have been. It is shown that he was at Pojoaque when the grant was made, and thereafter. Does that detract from this grant, because the father may have helped his son in his business? In all probability that business was the business of the father. It was a custom in New Mexico as people grew old that they would turn over the management of their business to their children, especially a favorite son, and allow him to conduct and carry on the business in his own name, while they would remain with him to assist him and advise him and help him about its management. Not one of the witnesses, except a person who shows hostility to the claimants in this grant, and who at the time supposed that he was an owner under another grant, and which

other grant had been admitted to be a forgery, but if not a forgery conflicted with this grant, has made such statement that the father was clerking for the son.

After that testimony was given, and before the trial of this case in the land court, Gaspar Ortiz died. The court will take notice that all of the evidence introduced by the defendant in the land court from the records of the surveyor general, was testimony which had been introduced before the surveyor general about five years subsequent to the time when he heard the case and rendered his decision thereon. That such testimony and the taking of such testimony was protested against, and objected to by the attorney of the complainants at the time, as not being authorized because the consideration of the case had gone to congress and had passed beyond the jurisdiction of the surveyor general, and that any subsequent proceeding on his part would be illegal and unauthorized and without authority in law.

See defendant's exhibit "D" record page 80.

Appellant's counsel also insists that it is uncerain from what source the custody of the grant came. That is one of the objections he made to its introduction. The testimony shows very clearly that this document when introduced, came from the archives and was produced by Mr. Sidebottom, the keeper thereof. That testimony does not show whether or not it had been always there or was subsequently placed there. The presumption is that coming from the archives, it was a part of the original archives and belonged there, and if that was not true, it was the duty of the defendant to show that fact and not of the claimant. He showed what made a prima facie case, that the document belonged to the archives, but if it was not a portion of the original archives, then it came from the hands of the heirs of the original grantee, and they would not have to account for the manner in which they obtained it except by showing that their father was dead, and that they were his heirs. The court must keep in mind that there were two copies of this document, both of which were presented to the governor, that is, the petition, and he executed both of them with the grant, gave one to the grantee, and the other to the

secretary of state, who was the keeper of the archives, to be placed by him in the archives. So there were two duplicate originals. And this is the only matter that creates any confusion as to these documents. It is contended that only a testimonial could be given to the grantee, and that the original expediente must remain in the archives. If there were two originals, as is shown beyond contradiction in this case, and one was placed in the archives, because a delivery to the custodian of the archives for the purpose of placing it in the archives, is actually placing it there. It is all that could be done for that purpose. That is when it reached the hands of the custodian, to be kept by him as a part of the archives. It is a notorious fact that there was probably not a single grant in New Mexico, from 1828 to 1846, inclusive, where a testimonial, that is a duly certified copy, was given to the grantee. Many of the grants which were confirmed, came from private hands and they were all in the shape of originals. If an original was used, that is, a duplicate original was used to give to the grantee instead of the original, would that make it invalid? The court will observe that in many of the California cases, where the loss of the original grant was accounted for from the archives, and the copy produced from private hands, that in every instance they proved the signatures of the governor and secretary, and other officers dealing with it, but that could not have been done if it was a testimonial, that is, a certified copy.

We have accounted for one copy of these granting papers by producing it from the archives. If there was another copy in the archives, that is, if this is not the one given to the custodian to place there, then that one is shown to be missing. This court has adjudicated the fact, and made it public and notorious so that it must take notice of it, that a portion of the archives containing grants was lost, and that that fact was sufficient to authorize the introduction of secondary evidence. If it is true that that copy was lost, then this one is introduced into evidence by claimant on the hearing, and its genuineness is proven, that is, as to all the official signatures to it. This proposition needs no further argument.

It is claimed that the surveyor general who decided this grant valid, expressed some doubts at the first, as to its genuineness. That might be true. Rec. page 76 is found the opinion of the surveyor general, and he says this: "I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth; but the testimony brought before me especially of the two last witnesses, *who beyond all question are highly respectable men,* has set my mind at rest on that point, and I am now entirely satisfied of the good faith of the claimants, the regularity of the original proceedings, and the legality of the grant. At any rate, I have given it the best investigation in my power before announcing this opinion, and can arrive at no other conclusion."

The Surveyor General had his doubts only when he first looked at the papers. After receiving the evidence all doubts were removed. Appellant's counsel has cast some slurring remarks through his argument in the brief at these witnesses for the claimant. The Surveyor General had them before him in person. He saw their appearance, their manner, their conduct and bearing on the witness stand. He was able to judge of their intelligence and capacity from personal observation, and he says of the last two witnesses that "they are beyond all question highly respectable men."

Not only is there a presumption from the result of the investigation and decision, and from the fact that the Surveyor General believed the witnesses, and decided in accordance with their testimony, which presumption follows in every case where a judgment is entered upon the judgment of witnesses, but the Surveyor General states so in this decision when he says those witnesses were "highly respectable." He was the best judge of those witnesses. He alone saw them, observed them, heard them speak, and noticed their manner and disposition, yet one of them is characterized as a swift witness by counsel for appellant. The other is spoken of as a man testifying in his own interest. Both of them say they have no interest. That they had transferred it, and it is a well-known, notorious fact

that they never claimed any interest except through their wives, and that they conveyed to their brother-in-law.

It is insisted that Surveyor General Julian, many years afterward, investigated this case and reached a different conclusion. That the court may understand the facts, we will give its history before the Surveyor General.

The petition for its confirmation was presented to the Surveyor General in September, 1872. In 1872 and 1873 the Surveyor General received evidence in regard to it. It was pending before him from September 2, 1872, until October 8, 1873. There was no concealment. The witnesses for the defense themselves state that while they were interested in an adverse grant, which it is admitted was a forgery, they knew of the pendency of the proceedings in 1872 before the Surveyor General, yet they did not appear until December 27, 1876, and then asked leave to present testimony showing the invalidity of the grant in question. The Surveyor General, H. M. Atkinson, on the next day answered their request as follows (page 80): "In response thereto I questioned my right to order a reinvestigation of a case long since passed upon by one of my predecessors, but I will take such testimony as may be presented to me relative to the question of alleged fraud, and forward the same to the proper authorities at Washington." On the same day he notified the claimant of this grant that he was ready to proceed immediately, and that claimant, through his attorney, filed the objection and protest found on page 80 of the record, entitled "Defendant's Exhibit B." And while claimant's attorney appeared and cross-examined those witnesses he declined to introduce any evidence, because he did not believe the Surveyor General had the right to open the case, and as he had protested against the same, he believed that if he introduced testimony in rebuttal that it would be virtually a consent to reopen it, and he therefore declined. This does not appear in the record, but it is a fact which the attorney who prepared it knows, he having been the same attorney in that instance. Appellant's attorney undertakes to criticise the witnesses produced before the Surveyor General, and to treat their evidence lightly and as not entitled to consider-

ation. The Surveyor General who heard them and saw them has given his opinion of those witnesses, at least two of them. The judge of the land court who rendered the opinion speaks of Judge Houghton, who was one of those witnesses: "Those witnesses need no defense." Counsel also seems to think this court should disregard this testimony because it would only be admissable under the provision of the act creating the land court, and because the United States was not represented at its taking. The United States was represented by the Surveyor General himself, just as every department of the government is represented when testimony is taken in any of the matters coming before it, like pension cases, land cases, etc. It was the duty of the Surveyor General to get at the facts; not only to represent the government, but the claimants. Congress of the United States makes the testimony admissable before the land court, and says the land court shall give it such weight as it is entitled to, when it stands practically uncontradicted; is plain and emphatic in its statements, and the witnesses are dead, and the government has waited fifty years before permitting this case to be tried in the land court, why should a government and the great court of that government be so ungenerous as to say they would give the testimony no weight. It cannot be believed.

The witness Antonio Sena is attacked because he stated that he had appointed, while he was prefect, Jose Dolores Trujillo justice of the peace (not alcalde) at Pojoaque. Why should he be attacked for that? He was the proper officer to make the appointment. He knew that he had made the appointments, and his testimony is uncontradicted, as we will show hereafter, when we reach the point in the brief where they again take up this subject as a separate proposition and discuss it, but strictures are cast upon T. B. Catron, who was also a witness. He was then the counsel of claimants before the land court, and he is now the same counsel who prepares this brief. Before answering the same, counsel calls attention to a little inaccuracy which appears in his testimony, at the top of page 64. He is there made to say: "And it was a document appointing Jose Dolores Trujillo as alcalde, or juez de barrio suplente,

of the jurisdiction of San Yldefonso, at Pojoaque." The mistake in the transcribing is that the word suplente should not follow the word barrio, but should follow the word alcalde, which should really be justice of the peace instead of alcalde, but that is unimportant. It should read alcalde (or justice of the peace) suplente or juez de barrio. With this correction, attention is called to what is said about the witness. It is said if the counsel testifying meant that the paper named Trujillo as alcalde suplente he directly contradicts Sena, who said he named him as alcalde. We insist that Sena did not say that he appointed Trujillo as alcalde, but he said, page 68: "I, as prefect, had authority to appoint the justices of the peace in my district, and I appointed him for the precinct or demarcation of Pojoaque," which certainly is very different from what appellant's counsel would have the court understand. He also says that if the counsel (Catron) means to say he appointed him juez de barrio suplente, it even more strikingly contradicts Sena. Counsel Catron did not mean to say that he appointed him juez de barrio suplente; the word suplente is wrongly placed in the testimony, and should not be there. He did say, however, that he appointed him juez de barrio at Pojoaque, in the jurisdiction at San Yldefonso. He states this proposition is negatived by five or six witnesses, and calls attention to the fact that Jesus Maria Ortiz y Baca, on page 27, testified that in 1846 he himself was juez de barrio at Pojoaque. On page 25 that witness testified that he lived all of his life and was born at Cuyamungue. That statement of that witness is positively contradicted by the documentary evidence introduced from the archives of San Yldefonso by that same witness himself. On page 125, defendant's exhibit "U" translation shows that there were five other justices appointed in the demarcation of San Yldefonso, on December 9, 1844. One at El Rancho, another at Jacona, and at Cuyamunge that same witness, Jesus Maria Ortiz was appointed, and at Pojoaque Miguel Trujillo was appointed. These were what are called juez de barrio or justice of the peace of the precinct or district. The court will notice that for the year 1846 no evidence is introduced showing any appoint-

ments for those places. The appointment before mentioned was made for the year 1845, and made on December 9, while defendant has introduced the proof that the justice of the peace of the entire demarcation of San Yldefonso, Serrano, was appointed in December, 1844, for the year 1845, and in December, 1845, for the year 1846, and also shows who was the suplente of that justice of the peace at San Yldefonso for the year 1845, and all of the justices of the peace of the barrios or precincts for the year 1845. They do not produce any appointment or paper showing any appointment of the justice of the peace suplente at San Yldefonso, or any of the justices of the peace for the precincts or barrios for the year 1846. That is exactly what Counsel Catron, who was then a witness, testified to. That he had seen such paper appointing Jose Dolores Trujillo either as alcalde (justice of the peace) suplente or juez de barrio at Pojoaque, in the jurisdiction of San Yldefonso, and that when the papers were presented on the trial of this case at the land court that paper could not be found. It is evident that Jesus Maria Baca y Ortiz, who said that he was the juez de barrio at Pojoaque, when he testifies that he never lived there, but lived in the barrio of Cuyamungue, and whom the records show was really juez de barrio in that place in the year 1845, must have stated what he knew to be untrue. And the counsel for appellants is not justified in saying that witness contradicted the witness Catron or any other witness on that proposition. Counsel of appellant criticises Counsel Catron as a witness on the trial because he did not bring out before the Surveyor General, on cross-examination, the fact of the existence of that appointment of Jose Dolores Trujillo as justice of the peace of de barrio at Pojoaque, and draws other conclusions which are not justified, and which, on second thought, we do not believe the counsel would have used. But as he has done so, we now call attention to the fact that claimant's attorney had protested against that procedure when that witness, Jesus Maria Baca y Ortiz, was examined and presented those papers, that he did not believe that such procedure was lawful or valid, and he says that he refrained from introducing any

evidence because it might waive his objection to reopening the case. Therefore, he did not go thoroughly into the cause, but counsel for claimant, who was the witness Catron, had not seen any of those papers until they were produced before the Surveyor General by that witness, Jesus Maria Ortiz y Baca, and until after the witness had gone off of the stand said counsel did not examine the papers which were produced and which were present. It was then he found the paper, but he deemed it best not to introduce, but left it among the papers, requesting that all those papers be carefully kept, as there were important papers of claimant's among them, because it was after the witness had left the stand. Counsel, who was witness Catron, feared that if he called particular attention to that paper in any way it might be lost, and he did not believe he had the right to introduce it on that occasion.

On the trial before the land court he called for all the papers, supposing that one would be among them, and on examination found that it was missing. He therefore gave his evidence in the land court, and the fact that that same witness who had those records swears that in 1846 he was the justice of the peace of the de barrio of Pojoaque, when in fact he admits that he never lived there, and was the year before the justice of the peace in another barrio, and the further fact that the records produced from the papers of that demarcation do show the appointment of all of the justices of the peace of barrios, in December, 1844, for the year 1845, and no such appointment or record is produced for the year 1846, is a very strong circumstance, taken in connection with the evidence of this counsel, who was witness Catron, that such paper did exist, and it has been spirited away.

The counsel for appellants seems not to have examined the law of Mexico in regard to appointing justices of the peace. The constitution of the 29th of December, 1836, section 27 of the sixth title, says:

"The justices of the peace, charged also with matters of police, shall be proposed by the sub-prefect and appointed by the prefect, and approved by the Governor, and shall hold their office for one year, and may be re-elected."

Section 177 of the law of March 20, 1837, provides that the departmental juntas, in conjunction with the governor, on the previous report of the prefects and sub-prefects, and taking into consideration the different circumstances of all the settlements of the department, shall fix the number of the justices of the peace, which there shall be in each of them, without failing to establish one in each precinct (barrio) or outside settlement (rancheria), which may be considerable and distant from any town.

Section 179 of the same law says: "The justices of the peace shall be appointed by the prefect of the district, on the suggestion of the respective sub-prefect."

These laws show that each barrio (precinct) or settlement having considerable people, distant from any town, should have a justice of the peace, and it seems that one was appointed for various little towns in the demarcation of San Yldefonso; at San Yldefonso one principal justice was appointed, and there was also appointed for him what was called a suplente, living at his place, who performed his duties when he was absent or disqualified or could not act, and also one for each one of the small towns.

The duties of these justices of the peace in their localities was prescribed by section 181 of the law of May 20, 1837, and was exactly the same duties as was conferred upon the alcalde, who was a superior officer and had jurisdiction over a larger territory. His duties were prescribed in sections 166, 167, 168, 169, 170 and 171. Section 181 states as follows:

"Speaking of the various justices of the peace mentioned in section 177 above, the law says:

"Thus those justices of the peace, as well as those of the places which do not have a thousand inhabitants, as those of the barrios (precinct) and rancherias distant from the towns, and those of the suburbs and wards of all the large towns, shall possess the power and duties which are granted and imposed on the alcaldes in articles 166, 167, 168, 169, 170 and 171."

So that it will be seen that the testimony of the witness who said that the duty of a juez de barrio, justice of the peace of a precinct, was only that of a constable, is also un-

founded and not supported. The fact is that in each demarcation there was one justice of the peace at the principal place who could exercise jurisdiction all over the demarcation. He had a man to supply his place as justice when he was absent, sick or not able to act. Then in every other town, district, precinct or considerable settlement a justice of the peace was appointed for those places, with the same powers within their precinct as that of the justice of the peace within the demarcation, and they all had the same as that of the alcalde, who was at the center of the general district, which might embrace several demarcations, and this Jose Dolores Trujillo was in 1846 the justice of the peace of the precinct (barrio) at Pojoaque.

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Defendant calls attention to the case of Bouldin vs. Phelps (12 Sawy.), where it is said the governor himself came into court and swore to his signature. That governor was Pico, whom this court has frequently characterized as unworthy of belief and unworthy of consideration on account of the many crooked acts and things which appeared to have been done by him in reference to Mexican grants in California. They evidently did not consider his evidence worthy of any consideration. We do not think it necessary to go into a defense of the witness for the claimant. The judgment of the Surveyor General and of the land court, and their expressions in regard to them, is sufficient, except as to the witness Dominguez, who is sought to be discredited in his evidence by an affidavit, a copy of which will be found on page 144 of the record. Dominguez gave his evidence before the Surveyor General November 19, 1872. The witness Fiske was the attorney for the claimants who represented the alleged grant, which was in conflict with the one in question, and which has since been abandoned as an outrageous forgery. At that time Mr. Fiske doubtless believed the forged grant he represented was genuine. He appeared and examined all the witnesses, who testified from time to time under the permission of the Surveyor General, to put in new evidence some years afterward, but stated that he did not believe that he had the right to open the case.

On May 4, 1877, the record on page 144 purports to

show that Pablo Dominguez made an affidavit substantially contradicting what he had stated before, and stating that Antonio Sena told him that he and Gaspar Ortiz y Alarid had fabricated the grant. This affidavit is kept in the pocket of Mr. Fiske until this case comes on to trial in the land court. It was not even produced before the Surveyor General, nor is it produced until long after Pablo Dominguez is dead. It was taken ex parte, and now it is sought to be introduced into evidence to contradict Pablo Dominguez. When claimant's counsel had no opportunity to cross-examine him an dfind out how he happened to make it, and what inducements were offered him, if any, and what was the condition of his mind. The Court of Private Land Claims sustained the objection to it and refused to admit it as evidence. We think there can be no question about that being correct. The mysterious way in which this affidavit seems to have been obtained, the manner in which it was kept, the secretiveness that attended it, and the dread of bringing it to light while Dominguez lived, apparently showed a course of procedure which cannot be justified, especially it cannot be justified in an attempt to introduce that document to discredit the evidence of Pablo Dominguez, given openly before the Surveyor General, or that of Antonio Sena. It will be noticed that before this pretended affidavit is brought to light both Antonio Sena and Gaspar Ortiz died. It may be asked, why the testimony of Gaspar Ortiz was not taken. At the time the case was investigated before the land court he was the interested party, and supposed not to be a competent witness on account of his interest. Counsel seems to make a serious contention for the introduction of this alleged affidavit of Pablo Dominguez. We will let the court struggle with him on that proposition, and if such testimony is to be allowed under such circumstances it is well for the country at large to know it, for we do not believe the legal profession are cognizant of any such principle or practice. It never has been the practice in the Territory of New Mexico to admit such evidence, nor in any of the federal courts.

Counsel relied upon the testimony of Donaciona Vigil to disprove the signature of Armijo and Vigil y Alarid as

genuine. That evidence was given before the Surveyor General after he had rendered his decision, and when he apparently agreed to take the evidence and forward it without opening the case.

This witness shows that he was well acquainted with Armijo and Juan Bautista Vigil. That he was acquainted with their handwriting, and had seen them write. When shown the document containing Armijo's signature and asked if it was genuine, he said that he had examined the document and signature of Governor Armijo, which he had seen him use all the time while he was secretary, and it appeared to him that the one which he was shown was not the same, and on further examination he said that he meant to say that in his judgment that signature was not the same Armijo was accustomed to use. He said he knew nothing at all about the grant, and would probably not know anything about it, as it was in a different office from the one he had. On cross-examination he testified that Juan Bautista Vigil y Alarid was secretary of the civil government from June 1, 1846, and was the custodian of the official papers pertaining to grants in New Mexico. That he had not seen Armijo write since 1846, and that he could not swear positively that the name of Armijo on the grant in question was not written by him, as he did not see him write it. He was then asked some questions in regard to a conversation between him and the counsel, T. B. Catron. He denied any such conversation. The counsel did not go on the stand to show that he had had such conversation, because the witness had not sworn that the signature of Armijo on the grant papers was not genuine. On the contrary, it had distinctly declined to make such statement in his evidence, and as the matters which he was asked about as to the conversation was only pertinent on that point, if he had sworn positively that it was not Armijo's genuine signature; as to that it was not deemed necessary to give further testimony, as it would not be really a contradiction. As to the other matters of conversation asked about, they would not be necessary, as they would be new matter and only hearsay.

Appellant's counsel in his brief discusses at great length

the propriety and legitimacy of the witness William Tipton, commencing on page 23 of the record. This testimony is directed entirely to a comparison of the handwritings of Governor Armijo and of his secretary, Juan Bautista Vigil y Alarid, with signatures purporting to be obtained on documents in the Surveyor General's office from the archives. It does not state when those documents reached the archives; whether they were placed there at the time of their execution or subsequently, nor does it state whether any of the documents containing Armijo's signature which were examined by Tipton were placed in the archives, nor does it give even the opinion of Tipton as to whether either of said documents produced by him for comparison with either of the two signatures of Armijo and of Vigil y Alarid are, in his opinion, genuine signatures of Armijo and of Vigil y Alarid, and nowhere is it admitted that they are genuine, nor does it appear as a matter of fact in any manner that they are genuine.

It is a rule of law that before signatures can be compared with others to determine the genuineness of one of them, the other signatures with which it is compared must either be admitted to be genuine, or the facts must be such that there can be no possible question or doubt as to their genuineness. That is, they must be established to be genuine beyond all possibility of a doubt by uncontradicted evidence. That has not been done in this case, nor has any effort been made to do it. The comparison of these signatures were objected to as not being proper or competent, and the evidence illegal. In addition to this a photographic copy of the signature of Armijo on the grant in question has been introduced, and another of a purported signature of Armijo, which has been selected by Tipton from among the fifteen which he used in comparisons made by him, and from this enlarged photograph of the two they seek to make comparison. But there is no proof whatever of the genuineness of the signature which was selected by Tipton from the fifteen to be photographed. It is not admitted to be genuine, and it is improper to compare it. It will be noticed, as before stated, that Tipton's testimony, page 25, says that in making his investigations, while he

was employed in the Surveyor General's office, it was confined solely to papers which were filed at the time. He does not state that a single one of those papers contained the signature of Armijo or of Vigil y Alarid, and on page 36 he shows that he selected fifteen alleged signatures of Armijo with which to make comparisons, and which was shown to him and introduced into evidence, and the only opinion or judgment he gives is on page 39, where he says his opinion is that th ose fifteen signatures on the fifteen papers selected by him were not written by the same person who wrote the signature of Armijo on this grant. He also states that the fifteen signatures which he used for comparison, to the best of his judgment, were made with a quill pen (page 58), while the signature of Armijo on the grant in question was made with a steel pen. It will be tiresome to go through the whole of Tipton's testimony and analyze it. The arguments of the United States is very much enlarged, and this one is also reaching a proportion which may be vexatious to the court, but we feel that our duty to our clients requires it. On the trial in the land court claimant objected to the introduction of Tipton's evidence by way of comparison of handwritings, and also objected to the use of the signatures which were compared with the two signatures of the Governor and secretary in this case, as not being proper, competent or admissable under the circumstances, and not being the best evidence. The court overruled these objections, and then appellant submitted to the witness Tipton various signatures purporting to be the signatures of Juan B. Vigil y Alarid, and of Governor Manuel Armijo, on pages 57 and 58 of the record. These papers were in evidence, and while not included in the record by an order, have been sent up to this court. Mr. Tipton testified that, in his opinion, each one of the signatures shown him on the documents marked "Plaintiff's Exhibit C-2, D-2, E-2, F-2, G-2, H-2 and I-2" were the genuine signatures of the parties referred to. He particularly testified that the signature of the photographed copy used as a comparison was made with a quill pen, and the signature to the copy on the grant was made with a steel pen. The attention of the court, without go-

ing into a long detail, is called to the vast differences existing between the different signatures of Armijo on the various papers introduced as plaintiff's exhibits, from C-2 to I-2. Mr. Tipton, as one of the principal distinguishing characteristics of Armijo's signature, stated in his evidence that the signature was never written perpendicular to the margin of the paper, but always sloping upward from left to right. We admit that that is a peculiarity in many of his signatures, but it did not contain a uniform slope from left to right, and in some instances included in the exhibits introduced by plaintiff it did not slope upward at all, but was perfectly parallel with the top and bottom of the paper and perpendicular to the sides. Exhibit C-2 is one where it slopes up very slightly, and none of them are in exactly the same proportion; while in exhibits H-2 and I-2 of plaintiff's the signature is written perfectly parallel with the top and bottom of the page and perpendicular to the sides. Attention is called to exhibit E-2, and on that same paper to a second signature, which show very great changes in the formation of the letters, and the making of the rubric. We understand that it is the duty of the court, when signatures are admitted, or proven beyond question and doubt, to be the genuine signatures, for the purposes of comparison, to make the comparison *themselves*, or, rather, it is the duty of the jury to determine that fact. In this case the land court, in view of all the light before them, with the presentation of these signatures and any others that they had before them, were the juries to that proposition, and they have passed upon them. It cannot be claimed that this court has as much information or as much light before them as the land court, who, for five or six years, had been examining those records in cases before them, and had opportunity to inquire into the witnesses and the character and condition of them, and who had before them some of the witnesses, were certainly the best judges of those signatures and the genuineness of the signatures in question.

Claimant insists that Tipton in no event was a competent witness, or that if he was a competent witness, then his testimony must be received with a great deal of caution and

allowance, and that very little weight, if any, can be given to it. By his evidence in chief, he did not claim to have derived any knowledge of the signature of Armijo while he was working as an employe in the Surveyor General's office. He shows that the only information or knowledge he obtained of the signature of Armijo, who he says he did not know, and never saw write, was after he was employed as a special agent to assist the United States attorney in the cases before the private land claims court, and that he thereupon made special investigation in regard to the signatures of Armijo, in order to be able to give his evidence in this case. He did not state that under his previous employment in the Surveyor General's office he ever had occasion to make comparison of signatures, especially the signatures of Armijo, but he says that all he did was to make copies and translations of the documents, and those were generally of documents filed at the time, so that he made no examination and never came in contact specially with any documents which had been filed or used prior to his employment in the Surveyor General's office, and he insists that such experience was not enough to qualify himself as an expert on handwriting, or to enable him to speak offhand of the genuineness of the signature of Armijo. And in no case in this trial has he attempted to do so. He has simply taken fifteen alleged signatures, and apparently gone on the assumption that they were genuine, without proving them to be genuine or showing when they got into the archives.

On cross-examination, page 52 of the record, Tipton stated he was employed as a special agent of the Court of Private Land Claims. That his duties were to assist the United States attorney for the Court of Private Land Claims in the preparation of cases which were to be tried, by examination of Spanish documents which may have been filed in the archives, or which might be presented by the plaintiffs, by examination of books of Mexican and Spanish law which are in the Spanish language, and in any other way in which his knowledge enabled him to be of service to him (the attorney) in preparation of cases. That part of his duty, or at least what he had done, was in the

way of hunting up evidence, in the preparation of evidence in the cases. That he was paid by the government of the United States a salary for these services. That one of his duties was to prepare the evidence in the cases, hunt it up, get it into shape and get it ready. That he had given particular attention to getting up the evidence in this case in regard to the examination and comparison of signatures. That he had been doing so for the last two years, with a view to giving his testimony in the case, and that the examination of those documents was with a view of giving testimony in the case in connection with his employment as assistant to the United States attorney. This will be found on pages 52 and 53 of the record. And we insist that a witness cannot be employed and paid to give evidence in a case, as we think this witness shows, was done, although we do not claim that the employment and payment was for this case alone. If it was for every case in the court the same rule would prevail. For this reason we think the testimony should have been rejected and not considered. Or if considered, very little weight should be given to it, if any. Certainly not enough weight to override the testimony of witnesses who swear they saw the signature actually made, and who the Surveyor General, who heard them testify, says they were men of high character.

It will not be doubted that the general rule of the common law is against the proof or disproof of disputed writings by other writings produced in evidence solely for such comparison. (Best, on Evidence, section 238.)

This general rule of evidence is recognized by most of the states of the United States, and by the United States Supreme Court and the Federal Court.

Williams vs. Conger, 125 U. S., 397.
Strother vs. Lucas, 6 Pet., 763.
Moore vs. United States, 91 U. S., 270.
United States vs. Jones, 10 Fed. R., 469.
Little vs. Beasley, 2d Ala., 703.
Jumpertz vs. People, 21 Ill., 374.
Kernin vs. Hill, 37 Ill., 209.
Hawkins vs. Grimes, 13 B. Monroe, 267.

Miller vs. Johnson, 27 Md., 36.
Aumick vs. Mitchell, 82 Penn. St., 211.
Handley vs. Gandy, 28 Tex., 211.
Rowt vs. Kile, 1 Leigh, 216.
State vs. Miller, 47 Wis., 530.
West vs. State, 22 N. J. L., 242.
Kinney vs. Flynn, 2 R. I., 319.

Such being the general rule in relation to disputed writings and the proof thereof, it is only reluctantly relaxed under the strong maxim, "lex non cogit impossibilia," when the writings are so ancient that it is impossible to find living persons to testify to the signatures directly. (Best, on Evidence, section 240.)

Even in those exceptional jurisdictions where expert evidence is sometimes admitted based on a comparison of handwritings solely, it has been received by the court and given but little weight as against the evidence of witnesses who saw the handwriting made or who are acquainted with the handwriting of the persons mentioned. The language used in Lawson on expert evidence, page 321, is called to the attention of the court specially, and also the cases of

Bell vs. Norwood, 7 La., 103.
Robinson vs. Arnet, 15 La., 264.
Bell vs. Shields, 19 N. J. L., 95.

In addition to the objection to Tipton as a witness, because he is the employe of the government, paid specially to hunt up and prepare evidence and testify on behalf of the government, his evidence should be suppressed also, because based upon a comparison with documents otherwise irrelevant, not admitted nor proven to be genuine, and selected solely for the purpose of such comparison, and not admissable for any other reason in the case. Such evidence is only admissable when the court is without the light of living testimony as to the documents or signatures, which is not the situation in this case. Such evidence can have no weight as against the evidence produced by the claimants, as to the authenticity of the documents in question.

The signature of Armijo and of Vigil y Alarid each is testified to absolutely and without qualification by Ramon Sena y Garcia, Judge Houghton and Pablo Dominguez. The first two stating they were present when the signatures were placed on the documents, and one of them went along with the grantee to get the signature. The evidence of Donacino Vigil, a witness for the defense, as before stated, is simply that the signature of Armijo to the document in question is different from other signatures which he had seen him write, which fact may be admitted, and is only an additional evidence of its genuineness. A forger undertakes always to imitate. There are differences between this signature and the others which are used as comparisons, but this is accounted for by the fact that the signature in question was made with a steel pen, which had but a short time before that been introduced into New Mexico, and the others with a quill pen, with which it appears that Armijo must have been unfamiliar, as all of his alleged signatures seem to have been made with a quill pen. The members of this court, some of them, are old enough to know and remember that fifty-three years ago the steel pens which were used were not as good as they are at this day. They did not possess smooth and soft points. At that time steel pens had not been much in vogue. They were not well made. They did not give down the ink well. They would stick in the paper, and a person used to writing with a quill pen would have great difficulty in making the same distinguishing characters of his handwriting with a steel pen as he would with a quill pen to which he was used, especially in making rapid strokes and flourishes and rubrics, such as were made by Armijo when using a quill pen. Assuming, for the sake of this argument, that the fifteen signatures used for comparison are genuine, and it is not disputed that a steel pen was used by Armijo in making the signature in question, the signature shows that he had to make several strokes of the pen to make both branches of the letter "A," and many to make the letter "[illegible]" Writing with a steel pen with a sharp or rough point, as all steel pens had fifty-three years ago, and an inexperienced person could never make or seldom make long upward strokes

without sticking the pen through the paper, and that accounts without doubt for the fact that there is no loop on the upper part of the letter "J" in the signature on this grant, which generally appears in the signatures of Armijo, but not always. For instance, on plaintiff's exhibit 2 there is no loop.

If a forger had been going to make Armijo's signature, knowing that Armijo wrote with a quill pen, he would have certainly used, first, some genuine signature of Armijo's as a model by which to make his forgery, and, being an intelligent man, he certainly would have used a quill pen to make the same kind of marks and show the same kind of characteristics. He would not have made a signature, which, if you take letter "A" and the letter "J," shows that in making it on the genuine signature he had to make several strokes of the pen, as Mr. Tipton says, "nearly cutting through the paper." The difference in the letter "M," in the name Armijo, can easily be accounted for by the fact that in using a steel pen, Armijo having found difficulty in making the letter "A," made the letter "M" much slower and more cautiously, like a school boy learning to write, which he was then doubtless doing with a steel pen.

Plaintiff's exhibit "I" will show the letter "M" in the same name made very much like it is in this name, so in the signatures of exhibit E-2 and I-2. There is a vast difference in the formation of the letter "A" in the exhibits presented by plaintiff from each other, and from the one in question as well as in the fifteen which were presented by defendants, if they are genuine, which has not been proven or established.

In the various rubrics of Armijo, no two rubrics correspond exactly with each other. They differ in almost every imaginable particular. The one in question was made with a steel pen, and the commencement of the stroke at the top is a little bit different than the stroke in some of the others. That is accounted for by the fact that it was made with a steel pen, and that with a steel pen it was more difficult to make an upward stroke to the left, as it had to be pushed in that direction, than to make a somewhat downward stroke to the left, and then run it slightly upward to the

right, because in both those movements the pen could be drawn, while in the movement upward and to the left it would have to be pushed and the point of the pen would enter the paper. That will account for the change in the commencement of that rubric. But we do not think that we have to account for that change. We have proven by eye-witnesses who saw it made that it *was made,* and by men, especially Judge Houghton, who was of distinguished character in New Mexico, that he was acquainted with the signature of Armijo, and that that was his signature.

An inspection of the exhibits presented by plaintiff will readily satisfy the court that Armijo signed his name in various ways, and with different characteristics at different times. It has been proven, if not in this case, in some other cases, that Armijo was an uneducated man and barely able to write his name. He was unused to a pen, especially a steel pen, and did not always produce a lithographic copy of his signature. The characteristics which Tipton found in the signatures which he selected, and on which he based such opinion as he gave, did not exist in many of the other signatures of Armijo. A distinguishing characteristic in that regard, as Tipton insists, is that the signature of Armijo was not written on the line parallel with the top of the paper or perpendicular to the side, but always sloped upward from left to right. Two signatures are produced, both of which are written parallel to the top and bottom of the page, directly in conflict with Tipson's evidence. When such differences will exist in a person's various signatures, written with a quill pen, with which he was in the habit of writing, we may well expect to find a wider variance when he undertakes, possibly for the first time, to write with a steel pen, and those steel pens being of the make of fifty-three or fifty-five years ago, when they had not the smooth and soft points to write with as now. Tipton conceded that "differences in signatures may be occasioned by the state of mind, health, position, writing materials, etc., of the writer," and this fact the court knows as well.

The photographs were improperly introduced. The authorities are against the practice. They say that thereby

collateral issues are raised. That even when used, the accuracy of the photograph must be fully established, and that then it is difficult to see why the copy should be allowed when the original is at hand.

Rogers on Expert Evidence, page 200.
Taylor Will Case, 10 Abb., Pr., 300.

The photographic copy which the defense has presented in this case will be seen by the court to be a reproduction of a most exceptional signature of General Armijo, if it is from a genuine one. Such roundness of outline and perfection of stroke are painfully wanting in most of the other samples that are used, showing that the selection by the attorney and the witness for the defense was not injudicious in their view of the case, illustrating thereby very plainly the danger of allowing the emphasizing of such particular testimony as this.

The last proposition urged by the counsel for appellant is that there is not sufficient evidence of possession by the grantee.

Ramon Sena y Rivera, who lived at Pojoaque, the same place where the grantee lived and where this land is situated, distinctly says that the grantee was placed in possession of the land in his presence. That from that time he lived upon the land and occupied it until his death, and his heirs afterward occupied it. This grant was made only about two months and a half prior to the occupation of New Mexico by General Kearny and the American troops. It was made in June, too late to plant a crop thereon that year. Before the next crop season came the sovereignty of the country had changed. War was prevailing in the territory, and although war had been declared twenty days before this grant was made, it could not have been known to have been so declared, at Santa Fe, at the time this grant was made. In New Mexico there was no war at that time. No hostile forces had reached its border, nor had any been organized even for the purpose of sending them into New Mexico. In the Fremont case the grant was made two years before the war, and yet he was excused from taking

possession before the change of sovereignty. But there is no doubt in this case that the grantee did take possession, and that he went on to the property, to live on it, immediately after the grant was made, or as soon thereafter as it was possible. The proofs say that from the time the possession was given he lived upon the property, and he and his heirs forever thereafter held it. That proof stands uncontradicted. The only effort to contradict it is by showing that possibly the last ten years of the grantee's life he clerked for his son at Santa Fe, and died at Santa Fe, in the latter part of 1861 or 1863, so that he must have remained, in any event, at Pojoaque, where this property was situate, for five years thereafter in person, and that was the time of course when he lived upon it. There was no necessity of proving any particular occupation of the grant —in what particular manner it was occupied. There is no condition expressed in the grant or act of juridical possession. If any was implied by the law, which fixes no conditions, either in it or in the regulations, such conditions would only have operated up to the change of sovereignty. It has been decided by this court, and by the commissioners and district court in California, that all conditions in grants made, either expressed or implied, imposed upon the grantee, ceased upon the change of sovereignty and the occupation of the country by the American troops, so that if there was any other obligation or condition imposed in any manner upon the grantee, binding him to any course of action, it ceased to operate on the 18th day of August, 1846, and it was not necessary to prove any occupation or possession after that date, although it has been proven, by proving that the grantee lived upon it, and by proving that he occupied it, and by proving that it was acknowledged and respected as his all the time afterward, and the only dispute about it being so acknowledged and accepted is by the owners or pretended owners of a forged and fraudulent grant, which the defendant undertakes to have this court notice, but did not dare to introduce into evidence, but which we here state, and defy contradiction, has been acknowledged and admitted to be a forgery. (United States vs. Reading, 18 How., 6.)

All the opposition which has been presented to the confirmation of the grant in question comes entirely through the claimant of that grant, who, without doubt, having a forged grant, the idea was instilled into their head by the old Polander who was backing them up that a charge of forgery, suggested by the fact that theirs was a forgery, would be a good way to defeat the grant in question and draw away a critical examination of theirs.

We respectfully submit that the decree of the court below shall be affirmed, confirming the grant for an amount not exceeding eleven leagues. We do not believe, however, that it will exceed 33,000 acres.

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